GEO. T. BISEL CO.
LAW PUBLISHERS
AND STATIONERS
724 SANSOM STREET
PHILADELPHIA

PENNSYLVANIA

STATE REPORTS.

VOL. 206.

CONTAINING

CASES DECIDED

BY THE

Supreme Court of Pennsylvania

AT MAY AND JULY TERMS, 1903.

REPORTED

BY

WILLIAM I. SCHAFFER.

STATE REPORTER.

THE BANKS LAW PUBLISHING CO.
NEW YORK
1910

Copyright, 1904,
By W. W. GRIEST, SECRETARY OF THE COMMONWEALTH,
for the State of Pennsylvania.

JUSTICES

OF THE

SUPREME COURT OF PENNSYLVANIA

DURING THE PERIOD OF THESE REPORTS.

Chief Justice, . . . J. Brewster McCollum.*
Justice, . . . James T. Mitchell.
Justice, . . . John Dean.
Justice, . . . D. Newlin Fell.
Justice, . . . J. Hay Brown.
Justice, . . . S. Leslie Mestrezat.
Justice, . . . William P. Potter.

ATTORNEY GENERAL.

Mr. Hampton L. Carson.

---

* Chief Justice McCollum on account of illness did not sit during the January, May and July Terms, 1903.

JUDGES

OF THE

SUPERIOR COURT OF PENNSYLVANIA

DURING THE PERIOD OF THESE REPORTS.

President Judge,	CHARLES E. RICE.
Judge,	JAMES A. BEAVER.
Judge,	GEORGE B. ORLADY.
Judge,	PETER P. SMITH.
Judge,	WILLIAM D. PORTER.
Judge,	THOMAS A. MORRISON.
Judge,	JOHN J. HENDERSON.

ATTORNEY GENERAL,

MR. HAMPTON L. CARSON.

JUDGES OF THE COURTS BELOW

DURING THE PERIOD OF THESE REPORTS.

DIST.

1st—Philadelphia County.

Courts of Common Pleas.

No. 1: CRAIG BIDDLE, P. J.; F. AMÉDÉE BRÉGY and ABRAHAM M. BEITLER, JJ.

No. 2: MAYER SULZBERGER, P. J.; WILLIAM W. WILTBANK, and NORRIS S. BARRATT, JJ.

No. 3: THOMAS K. FINLETTER, P. J.; CHARLES B. MCMICHAEL and HENRY J. MCCARTHY, JJ.

No. 4: ROBERT N. WILLSON, P. J.; CHARLES Y. AUDENRIED and WILLIAM WILKINS CARR, JJ.

No. 5: J. WILLIS MARTIN, P. J.; ROBERT RALSTON and G. HARRY DAVIS, JJ.

Orphans' Court.

WILLIAM B. HANNA, P. J.; WILLIAM N. ASHMAN, CLEMENT B. PENROSE and JOSEPH C. FERGUSON, JJ.

2d—Lancaster County.

Court of Common Pleas.

JOHN B. LIVINGSTON, P. J.; CHARLES I. LANDIS, J.

Orphans' Court.

EUGENE G. SMITH, P. J.

3d—Northampton County.

W. W. SCHUYLER, P. J.; HENRY W. SCOTT, J.

4th—Tioga County.

JEROME B. NILES, P. J.

5th—Allegheny County.

Courts of Common Pleas.

No. 1: FREDERICK H. COLLIER, P. J.; MARSHALL BROWN, and JAMES R. MACFARLANE, JJ.

No. 2: ROBERT S. FRAZER, P. J.; JOHN D. SHAFER and ELLIOTT RODGERS, JJ.

No. 3: JOHN M. KENNEDY, P. J.; SAMUEL A. MCCLUNG and JOHN A. EVANS, JJ.

Orphans' Court.

WILLIAM G. HAWKINS, JR., P. J.; JAMES W. OVER and J. J. MILLER, JJ.

6th—Erie County.

EMORY A. WALLING, P. J.

7th—Bucks County.

HARMAN YERKES, P. J.

8th—Northumberland County.
CLINTON R. SAVIDGE, P. J.; VORIS AUTEN, J.

9th—Cumberland County.
EDWARD W. BIDDLE, P. J.

10th—Westmoreland County.
LUCIEN W. DOTY, P. J.; ALEX. D. MCCONNELL, J.

Orphans' Court.

JOHN B. STEEL, P. J.

11th—Luzerne County.

Court of Common Pleas.

JOHN LYNCH, P. J.; GAIUS L. HALSEY, GEORGE S. FERRIS and FRANK W. WHEATON, JJ.

Orphans' Court.

ANDREW M. FREAS, P. J.

12th—Dauphin County.
JOHN H. WEISS, P. J.; M. W. JACOBS, J.

13th—Greene County.
R. L. CRAWFORD, P. J.

14th—Fayette County.
EDMUND H. REPPERT, P. J.; R. E. UMBEL, J.

15th—Chester County.
JOSEPH HEMPHILL, P. J.; WILLIAM BUTLER, JR., J.

16th—Somerset County.
FRANCIS J. KOOSER, P. J.

17th—Union County and Snyder County
HAROLD M. MCCLURE, P. J.

18th—Clarion County.
HARRY R. WILSON, P. J.

19th—York County.
JOHN W. BITTENGER, P. J.; W. F. BAY STEWART, J.

20th—Huntingdon County, Mifflin County and Bedford County.
JOHN M. BAILEY, P. J.

21st—Schuylkill County.

Court of Common Pleas.

OLIVER P. BECHTEL, P. J.; WILLIAM A. MARR and ARTHUR L. SHAY, JJ.

Orphans' Court.

P. M. DUNN, P. J.

22d—Wayne County.
GEORGE S. PURDY, P. J.

23d—Berks County.

Court of Common Pleas.

JAMES N. ERMENTROUT, P. J.; GUSTAV. A. ENDLICH, J.

Orphans' Court.

H. WILLIS BLAND, P. J.

24th—Blair County.
MARTIN BELL, P. J.

25th—Clinton County, Cameron County and Elk County.
CHARLES A. MAYER, P. J.

26th—Columbia County and Montour County.
ROBERT R. LITTLE, P. J.

27th—Washington County.
JOHN ADD. MCILVAINE, P. J.; JAMES F. TAYLOR, J.

28th—Venango County.
GEORGE S. CRISWELL, P. J.

29th—Lycoming County.
WILLIAM W. HART, P. J.

30th—Crawford County.
FRANK J. THOMAS, P. J.

31st—Lehigh County.
FRANK M. TREXLER, P. J.

32d—Delaware County.
ISAAC JOHNSON, P. J.

33d—Armstrong County.
W. D. PATTON, P. J.

34th—Susquehanna County.
DANIEL W. SEARLE, P. J.

35th—Mercer County.
SAMUEL H. MILLER, P. J.

36th—Beaver County.
JAMES SHARP WILSON, P. J.

37th—Warren County and Forest County.
WILTON M. LINDSEY, P. J.

38th—Montgomery County.

Court of Common Pleas.

AARON S. SWARTZ, P. J.; HENRY K. WEAND, J.

Orphans' Court.

WILLIAM F. SOLLY, P. J.

39th—Franklin County.
JOHN STEWART, P. J.

40th—Indiana County.
HARRY WHITE, P. J.

41st—Juniata County and Perry County.
JAMES W. SHULL, P. J.

42d—Bradford County.
ADELBERT C. FANNING, P. J.

43d—Pike County and Monroe County.
WILTON A. ERDMAN, P. J.

44th—Wyoming County and Sullivan County.
EDWARD M. DUNHAM, P. J.

45th—Lackawanna County.

Court of Common Pleas.

HENRY M. EDWARDS, P. J.; JOHN P. KELLY and EDWARD C. NEWCOMB, JJ.

Orphans' Court.

M. F. SANDO, P. J.

46th—Clearfield County.
CYRUS GORDON, P. J.

47th—Cambria County.
FRANCIS J. O'CONNOR, P. J.

48th—McKean County.
JOSEPH W. BOUTON, P. J.

49th—Centre County.
JOHN G. LOVE, P. J.

50th—Butler County.
JAMES M. GALBREATH, P. J.

51st—Adams County and Fulton County.
SAMUEL McC. SWOPE, P. J.

52d — Lebanon County.
ALLEN W. EHRGOOD, P. J.

53d — Lawrence County.
WILLIAM D. WALLACE, P. J.

54th—Jefferson County.
JOHN W. REED, P. J.

55th—Potter County.
JOHN ORMEROD, P. J.

56th—Carbon County.
HORACE HEYDT, P. J.

TABLE

OF

CASES REPORTED IN THIS VOLUME.

		Page
Account, Ridgway's	Equity,	587
Alexander's Est.,	Wills,	47
Andrews v. Blue Ridge Packing Co.,	Practice, C. P.,	370
Appeal, Plains Township's	Appeals,	556
Arcade Real Estate Co., Wadasz v.	Statutes,	539
Aspinall v. Viney,	Bill of Exchange,	383
Austin Boro., Carson v.	Water Companies,	303
Austin Borough, Potter Co., Water Co. v.	Water Companies,	297
Bainbridge v. Union Trac. Co.,	Negligence,	71
Baldwin v. Penna. Fire Ins. Co.,	Insurance,	248
Baldwin v. Urner,	Negligence,	459
Baltimore & O. R. R. Co., Custer v.	Negligence,	529
Bank, Second Nat., v. Guarantee Tr. & S. D. Co.,	Banks and Banking,	616
Bank of Boyertown, Nat., v. Fridenberg,	Principal and Agent,	243
Barclay v. Barclay,	Practice, C. P.,	307
Barnard, Knupp v.	Land Law,	280
Beatty, Schrader v.	Master and Servant,	184
Behl v. Phila.,	Negligence,	329
Belter v. Coal Twp.,	Negligence,	621
Black v. Black,	Partition,	116
Blauvelt v. Del., Lack. & Western R. R. Co.,	Negligence,	141

		Page
Blue Ridge Packing Co., Andrews v.	Practice, C. P.,	370
Bobb v. Union Trac. Co.,	Negligence,	265
Boro., Austin, Carson v.	Water Companies,	303
Austin, Potter Co., Water Co. v.	Water Companies,	297
Conshohocken, v. Conshohocken, Ry. Co.,	Street Railways,	75
Montooth, v. Brownsville Ave. St. Ry. Co.,	Street Railways,	338
Shamokin, v. S. Ry. Co.,	Street Railways,	625
Bousquet's Est.,	Escheats,	534
Bowman v. Knorr,	Husband and Wife—Decedent's Estates,	270, 272
Boyertown Nat. Bank v. Fridenberg,	Principal and Agent,	243
Bradford v. N. Y. and Pa. Tel. Co.,	Teleg. and Telep. Co's.,	582
Bradford, Contas v.	Municipalities,	291
Brew v. Hastings,	Partnership,	155
Brewing Co., Lauer, v. Chmielewski,	Judgment,	90
Bridge, Mifflinville	Railroads,	420
Briggs v. E. Broad Top R. R. & Coal Co.,	Negligence,	564
Brown v. White,	Negligence,	106
Browne, Willey v.	Promissory Notes,	322
Browne, Woolen Mach. Co. v.	Mechanic's Lien,	543
Brownsville Ave. St. Ry. Co., Montooth v.	Street Railways,	338
Bulletin Co., Naulty v.	Libel,	128
Bullock, Spaulding v.	Lunacy,	224
Burnham, Kase v.	Appeals,	330
Burton v. Erie Co.,	Prisons,	570
Butterman v. McClintic, Marshall Construction Co.,	Negligence,	82
Carlucci, McCollum v.	Partnership,	312
Carson v. Austin Boro.,	Water Companies,	303
Carter, Dayton v.	Church Law,	491

		Page
Cassard, Peter Adams Paper Co. v.	Husband and Wife,	179
Casualty Co. of New York, Fidelity and, Dives v.	Insurance,	199
Central Guarantee Tr. & S. D. Co. v. White,	Practice, C. P.,	611
Chmielewski, Lauer Brewing Co. v.	Judgment,	90
Citizens' Elec. Lt. & Power Co., Lansdowne v.	Boroughs,	188
Citizens' Gas Co., Gray v.	Equity,	303
Coal Co., Lehigh Val. v. Everhart,	Mines and Mining,	118
Coal & Nav. Co., Lehigh, Com. v.	Taxation,	641
Coal Twp., Belter v.	Negligence,	621
Czinski v.	Negligence,	621
Goodman v.	Negligence,	621
Coatesville & Downingtown St. Ry. Co. v. West Chester Ry. Co.,	Equity Practice,	40
Com. v. D. L. & W. R. R. Co.,	Taxation,	645
v. Lehigh Coal & Nav. Co.,	Taxation,	641
v. Lenousky,	Criminal Law,	277
v. Patterson,	Municipalities,	522
v. Pittsburg,	Municipalities,	379
v. Shortall,	Martial Law,	165
Title Ins. & Tr. Co., Sprigg v.	Equity,	548
Conshohocken Boro. v. Conshohocken Ry. Co.	Street Railways,	75
Construction Co., McClintic-Marshall, Butterman v.	Negligence,	82
Contas v. Bradford,	Municipalities,	291
Cooper's Est.,	Will,	628
Copper Co., Eureka Tempered, Wright v.	Practice, C. P.,	274
Croasdale v. Von Boyneburgk,	Equity,	15
Crowe v. Nanticoke Light Co.,	Negligence,	374

		Page
Crowe, Norris v.	Equity,	436
Culver v. Pocono Spring Water Ice Co.,	Mechanic's Lien,	481
Cunnius v. Reading School Dist.,	Constitutional Law,	469
Custer v. Balto. & O. R. R. Co.,	Negligence,	529
Czinski v. Coal Twp.,	Negligence,	621
Dailey v. Frey,	Marriage,	227
Dayton v. Carter,	Church Law,	491
DeLong v. Delaney,	Negligence,	226
Delaney, DeLong v.	Negligence,	226
Del. L. & W. R. R. Co., Blauvelt v.	Negligence,	141
Del. L. & W. R. R. Co., Com. v.	Taxation,	645
Del. Val. R. R. Co., Yetter v.	Equity,	485
Devlin, Krimm v.	Mortgage,	508
Devlin v. Phila.,	Road Law,	518
Dives v. Fidelity & Casualty Co. of N. Y.,	Insurance,	199
Dochkus v. Lithuanian Benefit Soc. of St. Anthony,	Church Law,	25
E. Broad Top R. R. & Coal Co., Briggs v.	Negligence,	564
Eberly v. Shirk,	Execution,	414
Ebert v. Johns,	Contracts,	395
Elliott, Irvine v.	Church Law,	152
Ellwanger v. Moore,	Attachm't Execution,	234, 241
Equitable Tr. Co., Wheeler v.	Insurance,	428
Erie Co., Burton v.	Prisons,	570
Erisman, Stoner v.	Slander,	600
Est., Alexander's	Wills,	47
Bousquet's,	Escheats,	584
Cooper's,	Will,	628
Hogg's	Partition,	415
Irvine's	Wills,	1
Kane's	Will,	204

		Page
Est., McAndrew's	Wills,	366
McCaul's	Contract,	506
Mansfield's	Guardian and Ward,	64
Megary's	Will,	260
Milliken's	Taxation,	149
Minnich's	Trusts and Trustees,	405
Raleigh's	Wills,	451
Richmond's	Will,	219
Sherwood's	Orphans' Court,	465
Wallace's	Guardian and Ward,	105
Eureka Tempered Copper Co., Wright v.	Practice, C. P.,	274
Everhart, Lehigh Val. Coal Co. v.	Mines and Mining,	118
Fidelity & Casualty Co. of N. Y., Dives v.	Insurance,	199
Fink v. Van Fossen,	Deeds,	362
Fitzpatrick v. Union Trac. Co.,	Negligence,	335
Fleschhut v. Lehigh Val. R. R. Co.,	Negligence,	348
Fretz, Rhymer v.	Nuisance,	230
Frey, Dailey v.	Marriage,	227
Fridenberg, Nat. Bank of Boyertown v.	Principal and Agent,	243
Fulton, Miller v.	Orphans' Court,	595
Gas Co., Citizens, Gray v.	Equity,	303
Gas Co., Wilkes-Barre, Miller v.	Gas Companies,	254
Gehr v. McDowell,	Wills,	100
Geist v. Rapp,	Negligence,	411
Germantown Real Est. Dep. & Tr. Co. v. Moore,	Attachm't Execution,	241, 242
Glenn v. Phila. & West Chester Trac. Co.,	Evidence,	135
Goodman v. Coal Twp.,	Negligence,	621
Gray v. Citizens' Gas Co.,	Equity,	303
Grayson, Hanbest v.	Wills,	59
Greenberg, Helffrich v.	Practice, C. P.,	516

		Page
Guarantee Tr. & S. D. Co., Bank v.	Banks and Banking,	616
Guarantors' Co., Q. & East. R. R. Co. v.	Attorney at Law,	350, 355
Hanbest v. Grayson,	Wills,	59
Hastings, Brew v.	Partnership,	155
Helffrich v. Greenberg,	Practice, C. P.,	516
Hinnershitz v. United Trac. Co.,	Equity,	91
Hogg's Est.,	Partition,	415
Holt v. Penna. R. R. Co.,	Negligence,	356
Hottle v. Weaver,	Evidence,	87
Hughes, Watkins v.	Appeals,	526
Ice Co., Pocono, Culver v.	Mechanic's Lien,	481
Indemnity Co., Guarantors' Liability, Q. & East. R.R. Co. v.	Attorney at Law,	350, 355
Insurance Co., Farmers' Mut. Fire, Shuman v.	Insurance,	417
Insurance Co., Penna. Fire, Baldwin v.	Insurance,	248
Irvine v. Elliott,	Church Law,	152
Irvine's Est.,	Wills,	1
Iseminger v. York Haven Water & Power Co.,	Negligence,	591
James Smith Woolen Mach. Co. v. Browne,	Mechanic's Lien,	543
Jennings v. Union Trac. Co.,	Negligence,	31
Johns, Ebert v.	Contracts,	395
Johns, Sargent v.	Contracts,	386
Juniata Co., Karl v.	Practice, C. P.,	633
Juniata Farmers' Mut. Fire Ins. Co., Shuman v.	Insurance,	417
Kane's Est.,	Will,	204
Karl v. Juniata Co.,	Practice, C. P.,	633
Kase v. Burnham,	Appeals,	330
Keck v. Phil. & R. R. R. Co.,	Negligence,	501

		Page
Kelley v. Shay,	Equity—App.,	208, 215, 218
King, Pittsley v.	Contracts,	193
Kipp, McFarlane v.	Partnership,	317
Knarr, Kossouf v.	Malicious Prosecution,	146
Knorr, Bowman v.	Husband and Wife—Decedents' Estates,	270, 272
Knupp v. Barnard,	Land Law,	280
Knupp, Wheeler v.	Tax Sales,	306
Kossouf v. Knarr,	Malicious Prosecution,	146
Krimm v. Devlin,	Mortgage,	508
Kuntz v. N. Y., Chicago & St. L. R. R. Co.,	Negligence,	162
Lansdowne v. Citizens' Elec. Lt. & Power Co.,	Boroughs,	188
Lauer Brewing Co. v. Chmielewski,	Judgment,	90
Lehigh Coal & Nav. Company, Com. v.	Taxation,	641
Val. Coal Co. v. Everhart,	Mines and Mining,	118
R. R. Co., Fleschhut v.	Negligence,	348
R. R. Co., Marsh v.	Negligence,	558
Lenousky, Com. v.	Criminal Law,	277
Light Co., Nanticoke, Crowe v.	Negligence,	374
Light & Power Co., Lansdowne v.	Boroughs,	188
Linck, Reid v.	Negligence,	109
Lithuanian Benefit Society, Dochkus v.	Church Law,	25
McAndrew's Est.,	Wills,	366
McCaul's Est.,	Contract,	506
McClintic-Marshall Construction Co., Butterman v.	Negligence,	82
McCollum v. Carlucci,	Partnership,	312
McConnell v. Penna. R. R. Co.,	Appeals,	370
McDowell, Gehr v.	Wills,	100
McFarlane v. Kipp,	Partnership,	317
Machinery Co., Woolen, Browne v.	Mechanic's Lien,	543

		Page
Mansfield's Est.,	Guardian and Ward,	64
Marks, Weiss v.	Payments,	513
Marsh v. Lehigh Val. R. R. Co.,	Negligence,	558
Marshall v. Pilots Assn.	Voluntary Associations,	182
Megary's Est.,	Will,	260
Mifflinville Bridge,	Railroads,	420
Miller v. Fulton,	Orphans' Court,	595
Miller v. Wilkes-Barre Gas Co.,	Gas Companies,	254
Milliken's Est.,	Taxation,	149
Minnich's Est.,	Trusts and Trustees,	405
Mitchell v. Spaulding,	Lunacy,	220
Montooth Boro. v. Brownsville Ave. St. Ry. Co.,	Street Railways,	338
Moore, Ellwanger v.	Attachm't Execution,	234, 241
Moore, Germantown Real Est. Dep. & Tr. Co. v.	Attachm't Execution,	241, 242
Muncy Creek Twp., Smith v.	Bridges,	7
Nanticoke Lt. Co., Crowe v.	Negligence,	374
Naulty v. Bulletin Co.,	Libel,	128
Neill, Phila. v.	Municipalities,	333
Neshaminy Ry. Co., P. & T. R. R. Co. v.	Street Railways,	343
N. Y., C. & St. L. R. R. Co., Kuntz v.	Negligence,	162
N. Y. & Pa. Tel. Co., Bradford v.	Teleg. and Telep. Cos.,	582
Norris v. Crowe,	Equity,	438
Norton, Strite v.	Wills,	100
Order of Sparta, Schoales v.	Beneficial Associations,	11
Packing Co., Blue Ridge, Andrews v.	Practice, C. P.,	370
Palmer v. Warren St. Ry. Co.,	Negligence,	574
Paper Co., Peter Adams, v. Cassard,	Husband and Wife,	179
Patterson, Com. v.	Municipalities,	522
Pemberton, Phila. v.	Appeals,	73

		Page
Penna. Fire Ins. Co., Baldwin v.	Insurance,	248
Penna. R. R. Co., Holt v.	Negligence,	356
McConnell v.	Appeals,	370
Seifred v.	Appeals,	399
Sutliff v.	Negligence,	267
Zook v.	Equity,	603
Peter Adams Paper Co. v. Cassard,	Husband and Wife,	179
Phila., Behl v.	Negligence,	329
Devlin v.	Road Law,	518
v. Neill,	Municipalities,	333
v. Pemberton,	Appeals,	73
v. Phila. Trac. Co.,	Taxation,	35
& R. R. R., Keck v.	Negligence,	501
& Tr. R. R. Co. v. Neshaminy Ry. Co.,	Street Railways,	343
& West Chester Trac. Co., Glenn v.	Evidence,	135
Trac. Co., Phila. v.	Taxation,	35
Pilots' Assn., Marshall v.	Voluntary Association,	182
Pittsburg, Com. v.	Municipalities,	379
Pittsley v. King,	Contracts,	193
Plains Township's Appeal,	Appeals,	556
Pocono Spring Water Ice Co., Culver v.	Mechanic's Lien,	481
Potter Co. Water Co. v. Austin Boro.,	Water Companies,	297
Quakertown & E. R. R. Co. v. Guarantors' Co.,	Attorney at Law,	350, 355
Railroad Co., Balto. & O., Custer v.	Negligence,	529
Del., L. & W., Blauvelt v.	Negligence,	141
Del., L. & W., Com. v.	Taxation,	645
Del. Val., Yetter v.	Equity,	485
Lehigh Val., Fleschhut v.	Negligence,	348
Lehigh Val., Marsh v.	Negligence,	558
N. Y., C. & St. L., Kuntz v.	Negligence,	162

		Page
Railroad Co, Penna., Holt v.	Negligence,	356
Penna., McConnell v.	Appeals,	370
Penna., Seifred v.	Appeals,	399
Penna., Sutliff v.	Negligence,	267
Penna., Zook v.	Equity,	603
P. & R., Keck v.	Negligence,	501
P. & T. v. Neshaminy Ry. Co.,	Street Railways,	343
Quakertown & E. v. Guarantors' Co.,	Attorney at Law,	350, 355
& Coal Co., E. Broad Top, Briggs v.	Negligence,	564
Railway Co., Brownsville Ave. St., Montooth v.	Street Railways,	338
Coatesville & D. St. v. West Chester Ry. Co.,	Equity Practice,	40
Conshohocken, Conshohocken Boro. v.	Street Railways,	75
Neshaminy E., P. & Tr. R. R. Co. v.	Street Railways,	343
Shamokin & Mt. Carmel, Shamokin Boro. v.	Street Railways,	625
Warren St., Palmer v.	Negligence,	574
Williamsport Pass., Williamsport v.	Street Railways,	65
Raleigh's Est.,	Wills,	451
Rapp, Geist v.	Negligence,	411
Reading, Stauffer v.	New Trials,	479
Reading School Dist., Cunnius v.	Constitutional Law,	469
Real Est. Co., Arcade, Wadasz v.	Statutes,	539
Real Est. Dep. & Tr. Co., Germantown v. Moore,	Attachm't Execution,	241, 242
Reid v. Linck,	Negligence,	109
Rhymer v. Fretz,	Nuisance,	230
Richmond's Est.,	Will,	219
Ridgway's Acct.,	Equity,	587
Rohrer, Svenson v.	Deed,	407

		Page
Sargent v. Johns,	Contracts,	386
Schoales v. Order of Sparta,	Beneficial Associations,	11
School Dist., Reading, Cunnius v.	Constitutional Law,	469
Schrader v. Beatty,	Master and Servant,	184
Second Nat. Bank v. Guarantee Tr. & S. D. Co.,	Banks and Banking,	616
Seifred v. Penna. R. R. Co.,	Appeals,	399
Shamokin Boro. v. S. Ry. Co.,	Street Railways	625
Shamokin & Mt. Carmel Elec. Ry. Co., Shamokin Boro. v.	Street Railways,	625
Shay, Kelley v.	Equity—App.,	208, 215, 218
Sherwood's Est.,	Orphans' Court,	465
Shirk, Eberly v.	Execution,	414
Shortall, Com. v.	Martial Law,	165
Shuman v. Juniata Farmers' Mut. Fire Ins. Co.,	Insurance,	417
Smith v. Muncy Creek Twp.,	Bridges,	7
Smith Woolen Mach. Co. v. Browne,	Mechanic's Lien,	543
Sparta, Order of, Schoales v.	Beneficial Associations,	11
Spaulding v. Bullock,	Lunacy,	224
Spaulding, Mitchell v.	Lunacy,	220
Sprigg v. Com. Title Ins. & Tr. Co.,	Equity,	548
Stauffer v. Reading,	New Trials,	479
Stoner v. Erisman,	Slander,	600
Strite v. Norton,	Wills,	100
Sutliff v. Penna. R. R. Co.,	Negligence,	267
Svenson v. Rohrer,	Deed,	407
Telephone & T. Co., N. Y. & P., Bradford v.	Telegraph and T. Cos.,	582
Township, Coal, Belter v.	Negligence,	621
Czinski v.	Negligence,	621
Goodman v.	Negligence,	621
Muncy Creek, Smith v.	Bridges,	7
Township's Appeal, Plains,	Appeals,	556
Trac. Co., Phila., Phila. v.	Taxation,	35

		Page
Trac. Co., Phila. & West Chester, Glenn v.	Evidence,	135
Union, Bainbridge v.	Negligence,	71
Union, Bobb v.	Negligence,	265
Union, Fitzpatrick v.	Negligence,	335
Union, Jennings v.	Negligence,	31
United, Hinnershitz v.	Equity,	91
Trust Co., Com. T. I. &, Sprigg v.	Equity,	548
Equitable, Wheeler v.	Insurance,	428
Germantown Real Est. Dep., v. Moore,	Attachment,	241, 242,
Guarantee, Bank v.	Banks and Banking,	616
Guarantee v. White,	Practice, C. P.,	611
Union Trac. Co., Bainbridge v.	Negligence,	71
Bobb v.	Negligence,	265
Fitzpatrick v.	Negligence,	335
Jennings v.	Negligence,	31
United Trac. Co., Hinnershitz v.	Equity,	91
Urner, Baldwin v.	Negligence,	459
Van Fossen, Fink v.	Deeds,	362
Viney, Aspinwall v.	Bill of Exchange,	383
Von Boyneburgk, Croasdale v.	Equity,	15
Wadasz v. Arcade Real Est. Co.,	Statutes,	539
Wallace's Est.,	Guardian and Ward,	105
Warren St. Ry. Co., Palmer v.	Negligence,	574
Water Co., Potter Co., v. Austin Boro.,	Water Companies,	297
Water & Power Co., York Haven, Iseminger v.	Negligence,	591
Waterhouse v. Waterhouse,	Husband and Wife,	433
Watkins v. Hughes,	Appeals,	526
Weaver, Hottle v.	Evidence,	87
Weiss v. Marks,	Payments,	513
West Chester Ry. Co., Coatesville & D. St. Ry. Co. v.	Equity Practice,	40

		Page
Wheeler v. Equitable Tr. Co.,	Insurance,	428
Wheeler v. Knupp,	Tax Sales,	306
White, Brown v.	Negligence,	106
White, Central Guarantee Tr. & S. D. Co. v.	Practice, C. P.,	611
Wilkes-Barre Gas Co., Miller v.	Gas Companies,	254
Willey v. Browne,	Promissory Notes,	322
Williams v. Williams,	Partnership,	644
Williamsport v. Williamsport Pass. Ry. Co.,	Street Railways,	65
Williamsport Pass. Ry. Co., Williamsport v.	Street Railways,	65
Wright v. Eureka Tempered Copper Co.,	Practice, C. P.,	274
Yetter v. Del. Val. R. R. Co.,	Equity,	485
York Haven Water & Power Co., Iseminger v.	Negligence,	591
Zook v. Penna. R. R. Co.,	Equity.	603

CASES CITED

IN THE

OPINIONS OF THE SUPREME COURT.

	Page
Adams v. Kuehn, 119 Pa. 76	393
Addams v. Tutton, 39 Pa. 447	315
Alexander v. Penna. Water Co., 201 Pa. 252	560
Allen v. Dundas, 3 T. R. 125	474
Anderson v. Levan, 1 W. & S. 334	321
Anewalt's Appeal, 42 Pa. 414	631
Atty. Genl. v. Del. and Bound Brook Ry. Co., 27 N. J. Eq. 1	587
Bair v. Frischkorn, 151 Pa. 466	529
Balsbaugh v. Frazer, 19 Pa. 95	354
Balto. Life Ins. Co. v. Gleisner, 202 Pa. 386	555
Bank v. Fordyce, 9 Pa. 275	138
Bank of Bellows Falls v. Rutland, etc., R. R. Co., 28 Vt. 470	555
Bard v. Ry. Co., 199 Pa. 94	164
Barlott v. Forney, 187 Pa. 301	97
Bech v. Hood, 185 Pa. 32	140
Becker v. Berlin Beneficial Soc., 144 Pa. 232	183
Bedford Springs Co. v. McKeen, 161 Pa. 639	496
Bennett v. Hayden, 145 Pa. 586	221
Blackmore v. Allegheny Co., 51 Pa. 160	525
Bohan v. Avoca Boro., 154 Pa. 404	138
Boyd v. Conshohocken Worsted Mills, 149 Pa. 363	529
Bradwell v. Pittsburg, etc., Ry. Co., 139 Pa. 404	481
Brenner v. Carter, 203 Pa. 75	217
Brew v. Hastings, 196 Pa. 222	161
Bricker v. Potts, 12 Pa. 200	602
Brinton v. Hogue, 172 Pa. 366	97
Brotzman's Appeal, 119 Pa. 645	490
Brower v. Kantner, 190 Pa. 182	497
Brown v. Com., 73 Pa. 321	279
Brumm's Appeal, 22 W. N. C. 137	257
Bumbear v. United Trac. Co., 198 Pa. 198	72
Burk v. Union Trac. Co., 198 Pa. 497	267
Buzby's Appeal, 61 Pa. 111	457
Cake's Est., 157 Pa. 457	633
Carroll v. Penna. R. R. Co., 12 W. N. C. 348	164, 404
Carter v. Producers' Oil Co., 200 Pa. 579	217
Cassidy v. Knapp, 167 Pa. 305	97, 487
Catawissa R. R. Co. v. Armstrong, 49 Pa. 186	503
Cheetham v. McCormick, 178 Pa. 186	39
Chester Trac. Co. v. Phila., etc., R. R. Co., 180 Pa. 432	97
Childs v. Penna. R. R. Co., 150 Pa. 73	533
City of Atchison v. King, 9 Kan. 550	192
City of Phila. v. Reeves, 48 Pa. 472	196
Clark v. Phila., 171 Pa. 30	520
Claybaugh v. Goodchild, 135 Pa. 321	590
Clow v. Pittsburg Trac. Co., 158 Pa. 410	579
Coatesville, etc., St. Ry. Co. v. Uwchlan St. Ry. Co., 18 Pa. Superior Ct. 524	46
Colvin v. B. & O. R. R. Co., 118 Pa. 230	504
Com. v. Bala & Bryn Mawr Tnpk. Co., 153 Pa. 47	586
v. Dillon, 81* Pa. 41	276
v. Keck, 148 Pa. 639	279
v. Mitchell, 80 Pa. 57	528
v. Penna. Coal Co., 197 Pa. 551	651
v. Pool, 6 Watts, 32	632
v. Scanlan, 202 Pa. 250	526
v. Uwchlan St. Ry. Co., 203 Pa. 608	46
Conn v. Graham, 64 Pa. 339	496
Corson's Est., 137 Pa. 160	529

	Page
Crawford v. Ford, 7 W. N. C. 532	457
Croasdale v. Von Boyneburgk, 195 Pa. 377	22
Crow v. Green, 111 Pa. 637	314
Cunnius v. Reading School Dist., 206 Pa. 469	469
Curtis v. Winston, 186 Pa. 492	370
Daubert v. Del., etc., R. R. Co., 199 Pa. 345	163
Davis v. Belford, 70 Mich. 120	198
v. Ravenna Creamery Co., 48 Neb. 471	198
v. Shafer, 50 Fed. Repr. 764	198
Davis & Rankin Bldg. & Mfg. Co. v. Barber, 51 Fed. Repr. 148	198
v. Jones, 32 U. S. App. 32	198
v. Murray, 102 Mich. 217	198
Delbert's Appeal, 83 Pa. 462	457
Delp v. Bartholomay Brewing Co., 123 Pa. 42	393
Detmold & Cox v. Gate Vein Coal Co., 3 W. N. C. 567..373,	517
Devlin v. Com., 101 Pa. 273	473
Ditmars v. Com., 47 Pa. 335	337
Dixey v. Phila. Trac. Co., 180 Pa. 401	579
Dodge's Appeal, 106 Pa. 216	459
Dougherty v. Hunter, 54 Pa. 380	484
Drenning v. Wesley, 189 Pa. 160	337
Duberly v. Day, 14 Beav. 9	213
Dubois's Appeal, 38 Pa. 231	354
Duffie v. Corridon, 40 Ga. 122	7
Dutton v. Lansdowne Boro., 198 Pa. 563	624
Ebert v. Johns, 206 Pa. 395	516
Eckfeldt's Appeal, 13 Pa. 171	528
Edgecombe v. Buckhout, 146 N. Y. 332	186
Ellis v. Lake Shore, etc., Ry. Co., 138 Pa. 506	533
Ellwanger v. Moore, 206 Pa. 234.....241,	242
Enys v. Donnithorne, 2 Burrows, 1190	196
Ex parte Milligan, 71 U. S. 2	169
Ferguson v. Bloom, 144 Pa. 549	291
Ferguson v. Wright, 61 Pa. 258	314
Fifth Ward B. & L. Assn. v. Boylan, 198 Pa. 250	538
Fleming v. Pittsburg, etc., Ry. Co., 158 Pa. 130	579
Ford v. Surget, 97 U. S. 594	173
Fredericks v. Northern Cent. R. R. Co., 157 Pa. 103	337
Freeland v. S. Penn. Oil Co., 189 Pa. 54	212
Frisbie v. McFarlane, 196 Pa. 116	319
Frishmuth v. Farmers' Loan & Tr. Co., 95 Fed. Repr. 5	555
Garmon v. Glass, 197 Pa. 101	276
Gaw v. R. R. Co., 196 Pa. 451	348
German-American Co. v. Cit. Tr. & Sur. Co., 190 Pa. 247	433
German Reformed Church v. Seibert, 2 Pa. 282	154
Gesell's Appeal, 84 Pa. 238	528
Gibbons v. Grinsel, 79 Wis. 365	198
Gilmartin v. Lackawanna Val. Trans. Co., 186 Pa. 193	360
Gilmore v. Federal St., etc., Pass. Ry. Co., 153 Pa. 31	360
Gilroy's Appeal, 100 Pa. 5	497
Girard Life Ins. Co. v. Phila., 88 Pa. 393	257
Goettel v. Sage, 117 Pa. 298	448
Goldsworthy v. Boyle, 175 Pa. 246	497
Good v. Herr, 7 W. & S. 253	447
Gosline v. Place, 32 Pa. 520	178
Greenfield Ave., 191 Pa. 290	548
Grier v. Northern Assurance Co., 183 Pa. 334	276
Gross v. Leber, 47 Pa. 520	448
Grubb's Appeal, 90 Pa. 228	555
Guarantee Tr., etc., Co. v. Farmers', etc., Bank, 202 Pa. 94	312
Gyger v. Phila. City Pass. Ry. Co., 136 Pa. 96	39
Gyger's Appeal, 62 Pa. 73	217
Hackett v. Providence Telegram Publishing Co., 18 R. I. 589	134
Hagan v. Carr, 198 Pa. 606	413
Hammett's Appeal, 83 Pa. 392	240
Harrison v. Collins, 86 Pa. 153	640
Hartman v. Danner, 74 Pa. 36	516
Heacock v. Fly, 14 Pa. 540	448
Henry v. McCloskey, 9 Watts, 145	631
Hestonville, etc., R. R. Co. v. Phila., 89 Pa. 210	39
Higgins v. Fanning & Co., 195 Pa. 599	560
Hill v. Hill's Adm., 32 Pa. 511	230
Homestead St. Ry. Co. v. Pittsburg, etc., Elec. St. Ry. Co., 166 Pa. 162	45
Hood v. Clapham, 19 Beav. 90	213
Howard v. Boro. of Olyphant, 181 Pa. 191	191
Howley v. Pittsburg, 204 Pa. 428	520
Hoyt v. Kingston Coal Co., 203 Pa. 509	127
Hughes v. Westmoreland Coal Co., 104 Pa. 207	138
Hunt's and Lehman's Appeals, 105 Pa. 128	630

	Page
Huntley v. R. R. Co., 38 Mich. 537	569
In re Plan 166, 143 Pa. 414	520
In re Widening of Chestnut St., 118 Pa. 593	521
Irwin v. Patchen, 164 Pa. 51	630
Irwin v. Workman, 3 Watts, 357	354
Jackson v. Litch, 62 Pa. 451	138
Jermyn v. City of Scranton, 186 Pa. 595	38
Jones v. Caldwell, 97 Pa. 42	631
v. Farquhar, 186 Pa. 386	217
v. Schuylkill Lt., Heat & Power Co., 202 Pa. 164	191
Kaine v. Weigley, 22 Pa. 179	437
Kauffman's Appeal, 55 Pa. 383	554
Kaufhold v. Arnold, 163 Pa. 269	465
Keeley v. Shanley, 140 Pa. 213	640
Kehler v. Schwenk, 144 Pa. 348	464
Kelley v. Shay, 206 Pa. 208, 215	218
Kelly v. Union Trac. Co., 199 Pa. 322	502
Kenyon v. Welty, 20 Cal. 637	449
Kepner v. Harrisburg Trac. Co., 183 Pa. 24	579
Kerper v. Hoch, 1 Watts, 9	632
Keystone Elec. Lt., etc., Co. v. People's Lt., H. & Power Co., 200 Pa. 366	555
King v. Hoare, 13 Meeson & Welsby, 494	322
Knupp v. Syms, 200 Pa. 489	306
Kyle v. Southern Elec. Lt. & Power Co., 174 Pa. 570	337
Laguerenne's Est., 12 W. N. C. 110	457
Laib v. R. R. Co., 180 Pa. 503	164
Laing v. Colder, 8 Pa. 479	579
Larimer & Lincoln St. Ry. Co. v. Larimer St. Ry. Co., 137 Pa. 533	44
Leeming v. Sherratt, 2 Hare, 14	458
Lehigh Coal & Nav. Co.'s Appeal, 112 Pa. 360	557
Val. R. R. Co. v. Brandtmaier, 113 Pa. 610	403, 533
& Wilkes-Barre Coal Co. v. Wright, 177 Pa. 387	127
Lehr v. Brodbeck, 192 Pa. 535	481
Leibert v. Hocker, 1 Miles, 263	518
Leibig v. Steiner, 94 Pa. 466	337
Leidy v. Messinger, 71 Pa. 177	314
Lesieur's Est., 205 Pa. 119	459
Long v. Harvey, 177 Pa. 473	497
Longenecker v. R. R. Co., 105 Pa. 328	163
Lorenz v. King, 38 Pa. 93	239
McBride v. Smyth, 54 Pa. 245	457
McCall v. McDowell, 1 Abb. (U. S.) 212	176
McCloskey v. Bell Gap R. R. Co., 156 Pa. 254	337
McGinnis v. Watson, 41 Pa. 9	154
McGlue v. Phila., 105 Pa. 236	528
McKeever v. Victor Oil Co., 9 Pa. C. C. Rep. 284	545
McKelvy's Appeal, 108 Pa. 615	354
McLain v. Com., 99 Pa. 86	279
McNeal v. Ry. Co., 131 Pa. 184	164
Manderson v. Lukens, 23 Pa. 31	475
Markley v. Swartzlander, 8 W. & S. 172	138
Marland v. Ry. Co., 123 Pa. 487	164
Martin's Est., 185 Pa. 51	457
Mason v. Eldred, 73 U. S. 231	321
Maurer v. Kerper, 102 Pa. 444	240
Mechling v. Kittanning Bridge Co., 1 Grant, 416	232
Meier v. Penna. R. R. Co., 64 Pa. 225	579
Mellon v. Reed, 123 Pa. 1	631
Meyers v. Kingston Coal Co., 126 Pa. 582	613
Miller v. Cornwall R. R. Co., 154 Pa. 473	504
Miller v. Oestrich, 157 Pa. 264	208
Millvale Boro., 162 Pa. 374	191
Minnich v. Lanc., etc., Elec. Ry. Co., 203 Pa. 632	624
Mitchell v. Harmony, 13 How. (U. S.) 115	173
Montgomery's App., 92 Pa. 202	591
Morios's Appeal, 4 Penny. 398	603
Morse v. R. R. Co., 30 Minn. 465	569
Mostyn v. Fabrigas, 1 Cowper, 161	178
Muckinhaupt v. R. R. Co., 196 Pa. 213	164
Mulherrin v. Del., etc., R. R. Co., 81 Pa. 366	504
Murray v. Herrick, 171 Pa. 21	314
Mutual Life Ins. Co. v. Tenan, 188 Pa. 239	518
Newbold v. Pennock, 154 Pa. 591	372
Newhard v. Penna. R. R. Co., 153 Pa. 417	533
Newhard v. Yundt, 132 Pa. 324	337
Nolde's Appeal, 2 Mona. 169	496
Norris's Appeal, 64 Pa. 275	151
Norristown v. Norristown Pass. Ry. Co., 148 Pa. 87	70
Northampton Co. v. Yohe, 24 Pa. 305	525
O'Donnell v. Allegheny Val. R. R. Co., 59 Pa. 239	569
O'Keefe v. Thorn, 24 W. N. C. 379	465

	Page
O'Neil v. McKeesport, 201 Pa. 386	555
Ogden v. Phila., 143 Pa. 430	520
Old Colony Trust Co. v. Transit Co., 192 Pa. 596	39
Oliver's Est., 199 Pa. 509	459
Palairet v. Snyder, 106 Pa. 227	445
Palethorp v. Palethorp, 184 Pa. 585	97, 487
Passyunk Bldg. Assn.'s Appeal, 83 Pa. 441	554
Patrick v. Smith, 165 Pa. 526	181
Patterson v. English, 71 Pa. 454	265
Penman v. McKeesport, etc., Ry. Co., 201 Pa. 247	360
Pennoyer v. Neff, 95 U. S. 714	474
Penna. & N. Y. Canal & R. R. Co. v. Mason, 109 Pa. 296	564
Penna. R. R. Co. v. Aspell, 23 Pa. 147	580
v. Mtg. Co. Pass. Ry. Co., 167 Pa. 62	586
v. Pittsburg, 104 Pa. 522	38
Penna. Schuylkill Val. R. R. Co. v. Phila. & R. R. R. Co., 160 Pa. 277	609
Penna. Steel Co.'s Appeal, 161 Pa. 571	528
Peters v. Florence, 38 Pa. 194	448
Peterson v. Del. River Ry. Co., 190 Pa. 364	276
Peterson's Appeal, 88 Pa. 397	631
Phila. v. Fox, 64 Pa. 169	573
v. Hestonville, etc., R. R. Co., 177 Pa. 371	70
v. Linnard, 97 Pa. 242	521
v. Ridge Ave. Pass. Ry. Co., 143 Pa. 444	70
v. Stewart, 195 Pa. 309	334
v. Thirteenth and Fifteenth Sts. Ry. Co., 169 Pa. 269	70
& R. R. R. Co. v. Anderson, 94 Pa. 351	579
& R. R. R. Co. v. Long, 75 Pa. 257	533
Phillips v. Bonsall, 2 Binn. 138	196
Pieper v. Union Trac. Co., 202 Pa. 100	267
Plains Township's Appeal, 21 Pa. Superior Ct. 68	557
Potter Co. Water Co. v. Austin Boro.., 206 Pa. 297	303
Powelson v. United Trac. Co., 204 Pa. 474	72
Prell v. McDonald, 7 Kan. 426	192
Price v. Conway, 134 Pa. 340	134
v. Hamscher, 174 Pa. 73	338
v. Lehigh Val. R. R. Co., 202 Pa. 176	560
Proper v. Luce, 3 P. & W. 65	602
Provenchere's Appeal, 67 Pa. 463	457
Provident Life & Tr. Co. v. Phila., 202 Pa. 78	165
Quakertown & Eastern R. R. Co. v. Guarantors' Liability Indem. Co., 206 Pa. 350	356
Quigley v. Del. & H. Canal Co., 142 Pa. 388	163
Rafferty v. Central Trac. Co., 147 Pa. 579	40
Railroad Co. v. Fox, 11 Bush (Ky.), 495	569
Ranninger's Appeal, 118 Pa. 20	188
Reading v. Union Trac. Co., 202 Pa. 571	70
Reading, etc., R. R. Co. v. Ritchie, 102 Pa. 425	533
Reeves v. Phila. Trac. Co., 152 Pa. 153	40
Ricard v. North Penna. R. R. Co., 89 Pa. 193	504
Riggs v. State, 4 Cold. 85	177
Robertson v. Smith, 18 Johnson, 459	322
Roshi's Appeal, 69 Pa. 462	29
Rowland v. Phila., 202 Pa. 50	624
Rudy's Est., 185 Pa. 359	457
Rummell v. Dilworth, 111 Pa. 343	464
St. Clair Coal Co. v. Martz, 75 Pa. 384	547
Sargent v. Johns, 206 Pa. 386	396
Sauerbier's Est., 202 Pa. 187	459
Scott v. McNeal, 154 U. S. 34	472
Seip's Est., 163 Pa. 423	393
Seitzinger v. Edison Elec. Co., 187 Pa. 539	191
Sellers v. Burk, 47 Pa. 344	517
Sessions v. Johnson, 95 U. S. 347	322
Seymour v. Hubert, 83 Pa. 346	518
Seymour v. Tradesmen's Tr., etc., Co., 203 Pa. 151	432
Shamokin Boro. v. Shamokin, etc., Ry. Co., 196 Pa. 166	627
Shaub v. Lancaster City, 156 Pa. 362	191
Sidwell v. Evans, 1 P. & W. 383	204
Smith v. Black, 9 S. & R. 142	321
Snodgrass's Appeal, 96 Pa. 420	528
Sparhawk v. Respublica, 1 Dallas, 357	173
Spaulding v. Bullock, 20 Pa Superior Ct. 301	225
Spees v. Boggs, 198 Pa. 112	560
Spisak v. B. & O. R. R. Co., 152 Pa. 281	503
Stack v. O'Hara, 98 Pa. 213	154
Stedman v. Poterie, 139 Pa. 100.	373
Steele v. Steele, 25 Pa. 154	591

Page

Steinbrunner v. Pittsburg, etc., Ry. Co., 146 Pa. 504..... 403
Stern v. Wilkes-Barre Gas Co., 2 Luz. Leg. Reg. 449..... 256
Stevenson v. Hay, 43 Pa. 191.... 138
Stewart Wire Co. v. Lehigh Coal & Nav. Co., 203 Pa. 474..... 555
Stoner v. Zimmerman, 21 Pa. 394 631
Straub v. City of Pittsburg, 138 Pa. 356 191
Strong's Executors v. Bass, 35 Pa. 333..... 239
Sullivan v. Phila. & R. R. R. Co., 30 Pa. 234..... 579
Swain v. Fidelity Ins. Co., 54 Pa. 455..... 224

Taylor v. Beatty, 202 Pa. 120... 185
Thane v. Scranton Trac. Co., 191 Pa. 249..... 72
Thomeuf v. Knights of Birmingham, 12 Pa. Superior Ct. 195. 14
Thompson's Appeal, 126 Pa. 367 609
Trac. Co. v. Phila., etc., R. R. Co., 180 Pa. 432 487
Trego v. Lewis, 58 Pa. 463..... 276
Twigg v. Sheehan, 101 Pa. 363.. 154

United States v. Ames, 99 U. S. 35..... 322
v. Carr, 1 Woods, 480..... 176
v. Clark, 31 Fed. Repr. 710. 175

Vanatta v. Anderson, 3 Binn. 417.....373, 517
Vincent v. Woodland Oil Co., 165 Pa. 402..... 190

Walker v. Morgan, 2 W. N. C. 173..... 373

Page

Wann v. McNulty, 7 Ill. 355.... 322
Ward v. Johnson, 13 Mass. 148. 322
Weaver v. Phila. Ry. Co., 202 Pa. 620..... 505
Wells v. Bunnell, 160 Pa. 460... 436
West's Appeal, 3 S. & R. 92.... 527
West Branch Bank v. Donaldson, 6 Pa. 179..... 138
Westmoreland Co. v. Fisher, 172 Pa. 317..... 526
Wheeler v. Real Est. Title Ins. & Tr. Co., 160 Pa. 408..... 432
Whelen's Appeal, 70 Pa. 410 ... 448
Whitmire v. Township of Muncy Creek, 17 Pa. Superior Ct. 399 10
Wiest v. Elec. Trac. Co., 200 Pa. 148..... 624
Williamsport v. Williamsport Pass. Ry. Co., 203 Pa. 1..... 69
Wilson v. Keller, 195 Pa. 98..... 97
v. Ott, 173 Pa. 253..... 448
v. Van Leer, 103 Pa. 600. .. 264
Wiltbank v. Tobler, 181 Pa. 103 181
Winter v. Federal St., etc., Pass. Ry. Co., 153 Pa. 26..... 360
Wolf v. Jacobs, 187 Pa. 260 372
Wolpert v. Knights of Birmingham, 2 Pa. Superior Ct. 564... 14
Womrath v. McCormick, 51 Pa. 504..... 457
Woodroffe v. Roxborough, etc., Ry. Co., 201 Pa. 521..... 72
Wray v. Tammany, 13 Pa. 393.. 240

Yerkes v. Yerkes, 200 Pa. 419.. 459
Yocum v. Commercial Nat. Bank, 195 Pa. 411..... 240

ACTS OF ASSEMBLY CONSTRUED.

1836. June 13, P. L. 551. Jurisdiction of Courts. Mifflinville Bridge, 420.
1836. June 13, P. L. 592. Lunatic's Estates. Mitchell v. Spaulding, 220.
1840. October 13, P. L. (1841). Practice—Equity. Sprigg v. Com. Title Ins. & Tr. Co., 548.
1843. April 13, P. L. 221. Bridges. Smith v. Muncy Creek Twp., 7.
1843. April 13, P. L. 233. Attachment Execution. Ellwanger v. Moore, 234.
1849. April 10, P. L. 619. Attachment Execution. Ellwanger v. Moore, 234.
1855. April 26, P. L. 328. Charities. Irvine's Est., 1.
1858. April 21, P. L. 385. Taxation. Phila. v. Phila. Trac. Co., 35.
1859. March 30, P. L. 309. Bridges. Smith v. Muncy Creek Twp., 7.
1860. March 12, P. L. 144. Bridges. Smith v. Muncy Creek Twp., 7.
1863. April 15, P. L. (1864) 1080. Railroads. Williamsport v. Williamsport Pass. Ry. Co., 65.
1864. March 31, P. L. 162. Collection of Township Debts. Plains Township's Appeal, 556.
1868. April 4, P. L. 58. Railroads. Keck v. Phila. & R. R. R. Co., 501.
1885. June 1, P. L. 37. Law Governing Philadelphia. Com. v. Patterson, 522.
1885. June 24, P. L. 155. Estates of Absent Persons. Cunnius v. Reading School Dist., 469.
1887. May 7, P. L. 94. Corporations. Yetter v. Del. Val. R. R. Co., 485.
1887. June 17, P. L. 409. Mechanics' Liens. James Smith Woolen Mach. Co. v. Browne, 543.
1889. May 2, P. L. 66. Escheats. Bousquet's Est., 534.
1889. May 14, P. L. 211. Railroads. Coatesville & Doylestown St. Ry. Co. v. West Chester Ry. Co., 40; Hinnershitz v. United Trac. Co., 91.

1893. April 6, P. L. 7. Beneficial Associations. Schoales v. Order of Sparta, 11.
1893. May 4, P. L. 29. Corporations. Yetter v. Del. Val. R. R. Co., 485.
1893. June 8, P. L. 360. Building Laws. Wadasz v. Arcade Real Est. Co., 539.
1901. May 3, P. L. 140. Boroughs. Potter Co., Water Co. v. Austin Boro., 297.
1901. June 4, P. L. 364. Municipal Liens. Phila. v. Pemberton, 73.
1901. June 7, P. L. 514. Railroads. Coatesville & Downingtown St. Ry. Co. v. West Chester Ry. Co., 40.
1901. June 7, P. L. 531. Railroads. Mifflinville Bridge, 420.
1901. June 24, P. L. 596. Store Orders and Taxation. Com. v. Lehigh Coal & Nav. Co., 641.

CASES

IN

THE SUPREME COURT

OF

PENNSYLVANIA

Irvine's Estate.

Will—Execution—Witnesses—Devise to religious and charitable uses—Act of April 26, 1855, P. L. 328.

A will containing a charitable or religious bequest to be valid must be executed precisely according to the statute.

The purpose of the Act of April 26, 1855, P. L. 328, was to establish a higher degree of proof as to the execution of a will containing a charitable or religious bequest than for other wills; and also to require such a will to be executed at a time when the testator might be in the full possession of his faculties, and not influenced by unscrupulous and designing persons when he was in the immediate presence of death. To attest or witness such a will, the witness must be present when the writing is signed and thereby becomes a will, or the testator may after he has affixed his signature acknowledge it to be his act in the presence of the witnesses.

Where one of the attesting witnesses to a will containing religious bequests signed it before the testator and out of her presence, and the other attesting witness signed it without seeing the signature of testator or knowing whether she had signed it or not, the will is not executed as provided by the Act of April 26, 1855, P. L. 328, and the religious bequests are void.

Argued Feb. 25, 1903. Appeal, No. 16, Jan. T., 1903, of Allie L. Appley, from decree of O. C. Wayne Co., No. 235, Docket L, making distribution of the estate of Allamanda D. Irvine. Before MITCHELL, DEAN, FELL, BROWN, MESTREZAT and POTTER, JJ. Reversed.

Exceptions to the report of R. M. Stocker, Esq., auditor. Before PURDY, P. J.

The facts appear in the opinion of the Supreme Court.

Error assigned was in awarding the residue of the estate to the Board of Home and Foreign Missions of the Presbyterian Church and to the Presbyterian Church of Cochecton, N. Y.

Homer Greene, for appellant.—To attest is one thing, to subscribe is another: Reed v. Watson, 27 Ind. 443.

While most of the definitions imply a subscription by the witness as a part of the act of attestation, all of them make it an absolute necessity that the witnesses should have actually witnessed the act of execution. Indeed, without such physical evidence on the part of the witness he does not, under the definitions, attest the will at all.

No circumstances can obviate the necessity of an attesting witness actually seeing the testator sign his name to the will, or else receiving from him subsequently a distinct acknowledgment and declaration that it is his signature: Mickle v. Matlack, 17 N. J. L. 86.

H. Wilson and *Alfred Hand*, with them *A. T. Searle*, for appellee.—The fact that a witness signs before the testator does not avoid compliance with the law, where the testator knows all about it: Miller v. McNeill, 35 Pa. 217.

The courts of this state have liberally construed statutes relating to the execution of wills: Eyster v. Young, 3 Yeates, 511; Rohrer v. Stehman, 1 Watts, 442; Hight v. Wilson, 1 Dall. 94; Knox's Estate, 131 Pa. 220; Miller v. Carothers, 6 S. & R. 215.

OPINION BY MR. JUSTICE MESTREZAT, May 4, 1903:

Mrs. Allamanda D. Irvine, the widow of Charles Irvine, resided in Damascus township, Wayne county, Pennsylvania, for many years prior to her death, which occurred January 11, 1901, while she was temporarily in Florida. After her death there was found among her papers, her last will and testament bearing date of August 14, 1896, to which was subscribed the

names of Mrs. Louisa T. Brittain and Miss Carrie A. Tyler, as witnesses. The will was admitted to probate by the register of Wayne county on the affidavits of the two subscribing witnesses and of three other witnesses that the signature of the testatrix affixed to it was genuine. In the affidavit of Miss Tyler, it is said: "Deponent further says that she did not see the said Allamanda D. Irvine sign her name to the instrument nor does she know when the said name was so signed, and that she does not know whether or not the signature of the said Allamanda D. Irvine was upon the said instrument when she, the deponent, signed her name thereto as a witness." The affidavit of Mrs. Brittain contains, inter alia, the following: "Deponent further says that at the time she, the deponent, signed her name as a witness to the execution of said will, the said will had not yet, as a matter of fact, been either seen or executed by the said testatrix, nor had the name of the said Allamanda D. Irvine yet been signed thereto; . . . . and that at the time she so wrote, prepared and signed her name as a witness to said will, the said Allamanda D. Irvine was at her own home in said Damascus township, and did not see nor execute said will until some time after deponent had subscribed her name to said will as a witness, but how long after the testatrix executed said will or in whose presence the testatrix signed her name to said will, or where or under what circumstances, the deponent does not know."

The facts regarding the preparation and the execution of the will, as found by the auditor and approved by the trial court, are as follows: "Some time in the first part of August, 1896, Mrs. Allamanda D. Irvine, widow of Charles Irvine, of Damascus township, Wayne county, Pennsylvania, requested Mrs. Louisa T. Brittain to write her will for her. Mrs. Brittain had a few years before this removed to Ridgebury, Orange county, New York, and was now on a visit to W. W. Tyler, her father's home. She called on her old neighbor, Mrs. Irvine, whom she had known from childhood, and while at the home of Mrs. Irvine, when no one else was present, Mrs. Irvine gave Mrs. Brittain directions how she wanted her will made, which instructions Mrs. Brittain reduced to writing. She further requested Mrs. Brittain to sign it as a witness and return it to her by registered letter, after it was prepared. Mrs. Brittain

returned to her home in Ridgebury and drew the will as instructed, and subscribed as a witness as requested, August 14, 1896, and sent the paper writing to Mrs. Irvine by registered letter, and took a receipt therefor. Miss Carrie E. Tyler, now Mrs. Ellison, who was postmistress, received the parcel in 1896, she does not remember the exact date, and delivered it to Mrs. Irvine. A few days afterward, Mrs. Irvine, who resided only about one fourth of a mile from Miss Tyler's, came to Miss Tyler with a paper writing, which she said was her will, requesting Miss Tyler to sign it as a witness. She signed as requested. . . . Both of the subscribing witnesses were familiar with the signature of Mrs. Irvine, and recognized it as being her true signature, but neither of the witnesses saw Mrs. Irvine sign her name to the will. Mrs. Brittain knows the name of Mrs. Irvine was not written when she subscribed as a witness and Mrs. Ellison does not know whether it was there or not. She did not examine the will in any way, she says."

Letters testamentary were granted to Mrs. Allie L. Appley, the only daughter and heir of the testatrix, in February, 1901. She filed an account as executrix in January, 1902, and on the confirmation thereof an auditor was appointed to make distribution of the balance in her hands. After making certain bequests and disposing of some life interests in her estate, the testatrix gave the residue thereof to the Boards of Home and Foreign Missions of the Presbyterian Church in the United States of America, and to the Presbyterian Church of Cochecton, N. Y. Before the auditor, Mrs. Appley claimed the legacies bequeathed to religious uses on the ground that they were void by reason of the will not having been executed in accordance with the Act of April 26, 1855, Purd. Dig. 2104, pl. 23. The auditor and the learned court below found against the claim and awarded the fund as directed in the will. The correctness of this ruling is the only question raised by the assignments of error.

Section 11 of the act of 1855 provides, inter alia, as follows: "No estate, real or personal, shall hereafter be bequeathed, devised or conveyed to any body politic, or to any person, in trust for religious or charitable uses, except the same be done by deed or will, attested by two credible, and at the time, disinterested witnesses, at least one calendar month before the

decease of the testator or alienor; and all dispositions of property contrary hereto, shall be void and go to the residuary legatee or devisee, next of kin, or heirs, according to law."

This statute, it will be observed, became a law of the commonwealth twenty-two years after the Wills' Act of 1833. The 6th section of that act requires a will to "be proved by the oaths or affirmations of two or more competent witnesses." Under this act neither subscribing nor attesting witnesses are necessary to give validity to a will. The proof of the signature of the testator by at least two competent witnesses is the only requisite imposed by the statute. This was well understood when the act of 1855 was passed. It relates to and affects the execution of such wills only as bequeath or devise estates for religious or charitable uses. We must assume that as to wills containing provisions for these uses, the legislature intended to change the manner of execution prescribed by the act of 1833, otherwise, the legislation would be to no purpose. This intention is clearly disclosed by the language used in the act of 1855. It requires a will disposing of estates for charitable or religious uses to be "attested by two credible, and at the time, disinterested witnesses;" and such wills must be thus executed "at least one calendar month before the decease of the testator." Neither of these requirements, as we have seen, is necessary to the validity of a will under the prior act of 1833. The simple proof of the signature of the testator by two or more witnesses, not necessarily attesting witnesses, is sufficient under the terms of that act. The difference in the language of the two acts shows that the purpose of the latter legislation was to establish a higher degree of proof as to the execution of a will containing a charitable or religious bequest; and also to require such a will to be executed at a time when the testator might be in the full possession of his faculties and not influenced by unscrupulous and designing persons when he is in the immediate presence of death.

The statute requires the will to be "attested by two credible witnesses." This language presupposes the existence of a writing signed by the testator at the time of the attestation. The writing does not become a will under the act of 1833 until it is "signed by him (testator) at the end thereof." It requires the signature of the testator to make it his act and to

transform the work of the scrivener into the will of the testator. To attest or witness the will, the witness must be present when the writing is signed and thereby becomes a will, or the testator may, after he has affixed his signature, acknowledge it to be his act in the presence of the witnesses. The meaning of the language employed in the statute exacts these requirements, and no other rational interpretation can be placed upon it. Unless the witnesses are present at the execution of the will or the signature of the testator is acknowledged in their presence, they have not the knowledge to enable them to testify to the date of, or circumstances attending, its execution, which, if in controversy, it was the intention of the statute should be made to appear by those asserting the right to bequests for religious or charitable uses. Mere knowledge, therefore, of the testator's handwriting or of his signature by a person does not give him the statutory qualifications of a witness.

The facts in the case at bar were found by the auditor and are not in dispute. It does not appear when the will was signed by the testatrix. Neither of the subscribing witnesses saw her sign nor knows when she did sign it. They testify that they do not know when, where or under what circumstances it was signed. Mrs. Brittain drew the will and attached her signature to it before the testatrix had signed it. Miss Tyler, the other subscribing witness, says she does not know when the testatrix signed the will nor whether she had signed it or not when she subscribed her name as a witness. The two witnesses, therefore, had the same, and no other, knowledge of the execution of the will than the three other witnesses had who appeared before the register to prove the will. Although subscribing witnesses, they were not attesting witnesses, and, before the register and auditor, identified the testatrix's signature solely from their knowledge of her writing. This testimony was sufficient proof of the execution of the will under the act of 1833, but did not meet the requirements of the act of 1855. No witness saw the testatrix sign the will, nor did she acknowledge the signature attached to the will to be her signature. There was, therefore, no attesting witness called to prove the execution of the will and the instrument was necessarily inoperative as to the bequests to religious uses.

The auditor and court below held "that while the letter of

the act of 1855 has not been complied with, the spirit and intent is in no way violated by the attestation and probate of this will." The auditor found that the testatrix was in perfect health at the time the will was presumed to have been signed, and that no undue influence or fraud "such as is contemplated in the act of 1855" had been practiced upon her. It should have occurred to the learned auditor that under the facts disclosed these matters were not in issue in this case, and that they did not control the disposition of it. The question for his determination was whether in the execution of this will there had been a compliance with the provision of the act of 1855. That was the issue before him and the court below, as it is here. The legislature having declared the manner in which a will must be executed to carry bequests to religious uses, it was not within the power or authority of the trial court to disregard the legislative mandate and substitute another mode of execution of the instrument which to the court might appear equally efficient in carrying out "the spirit and the intent" of the legislative will. "Nothing is better settled," says the court in Duffie v. Corridon, 40 Ga. 122, "than that a will, to be good, must be executed precisely according to the statute." When it was found as a fact, as it virtually was conceded to be, that the will of Mrs. Irvine had not been executed in compliance with the act of 1855, the bequests to the religious uses should have been disregarded and the fund applicable thereto should have been distributed to the parties named in the statute.

The decree is reversed, and the record is remitted to the court below that distribution may be made in conformity with the views expressed in this opinion.

Smith *v.* Muncy Creek Township, Appellant.

Bridges—Repair of bridges—Counties—Townships—Acts of April 13, 1843, *P. L.* 221, *March* 30, 1859, *P. L.* 309, *and March* 12, 1860, *P. L.* 144.

The special Act of March 30, 1859, P. L. 309, extended by the Act of March 12, 1860, P. L. 144, to Lycoming county, makes it the duty of supervisors and street commissioners in that county to keep in repair all bridges built by the county.

Township supervisors are not agents of the county commissioners in making repairs to a county bridge, and the duty of repairing and consequently of inspecting is primarily on the township.

Negligence—Township—Defective bridge.

Township supervisors owe a duty of inspection to bridges under their control, and deterioration of the timbers of a bridge should have been known to the supervisors where it appears that the floor timbers of a bridge had not been renewed for fifty-five years.

Negligence—Townships—Defective bridge—Traction engines.

Township supervisors having knowledge that the use of traction engines in the township had become general and that their transportation had been for many years an ordinary use of the roads of the township, should provide against dangers from this ordinary and reasonable use of the township bridges.

Negligence—Extent of injuries—Question for jury.

In an action to recover for personal injuries received by the fireman of a traction engine, caused by the engine breaking through a bridge and precipitating itself and him into a stream some distance below, the questions as to whether or not hemorrhages of the stomach, with which he suffered three months after the accident, and his physical condition at the time of the trial, were the direct consequences of his injuries by the accident, are for the jury.

Argued March 17, 1903. Appeal, No. 286, Jan. T., 1902, by defendant, from judgment of C. P. Lycoming Co., June T., 1900, No. 52, on verdict for plaintiff in case of Harry M. Smith v. Muncy Creek Township. Before MITCHELL, DEAN, FELL, BROWN and POTTER, JJ. Affirmed.

Trespass to recover damages for personal injuries. Before MCCLURE, P. J., of the 17th judicial district, specially presiding.

From the record it appeared that the plaintiff was the fireman on a traction engine and while it was crossing a bridge over Little Muncy creek in Muncy Creek township, Lycoming county, the bridge floor broke through and the engine was precipitated into the water of the stream below, the plaintiff falling with it. No physician attended the plaintiff until three months after the accident when he was seized with a violent hemorrhage of the stomach, which physicians, called at the trial, attributed to the result of the accident. The further facts appear by the opinion of the Supreme Court.

Verdict and judgment for the plaintiff for $7,218. Defendant appealed.

Errors assigned were various rulings of the court upon the question of the liability of the defendant for the injuries of the plaintiff; and in submitting to the jury the question as to whether the physical conditions of the plaintiff resulted from the accident.

Robert K. Reeder, with him *W. C. Gilmore*, for appellant. —A township is not bound to keep a county bridge in repair for the safe passage of heavy traction engines: Act of April 13, 1843, P. L. 221; Act of March 30, 1859, P. L. 309; Act of March 12, 1860, P. L. 144.

The bridge having been originally constructed by the county in a defective manner, thus causing the injury, the township is not liable: Rigony v. County of Schuylkill, 103 Pa. 382.

N. M. Edwards, with him *G. B. M. Metzger* and *C. E. Sprout*, for appellee.—The obligation of keeping the township bridge in question in repair was upon the township and not upon the county: Whitmire v. Muncy Creek Township, 17 Pa. Superior Ct. 399.

In order to fix liability for neglect to repair, the question is, whose is the duty to repair, not, who is finally liable for the costs of the repairs: Township of Newlin v. Davis, 77 Pa. 317.

Opinion by Mr. Justice Fell, May 4, 1903:

The bridge that broke under the weight of the traction engine on which the plaintiff was riding was built by the county commissioners in 1844, and from that time to the time of the accident in 1899, the floor timbers had not been renewed nor inspected by boring. The main question of law at the trial was whether the township was liable for the failure of its supervisors to keep a county bridge in repair. The Act of April 13, 1843, P. L. 221, relieves townships from the duty of making ordinary repairs to county bridges, and imposed the duty on the county commissioners, except in certain counties which were exempted from the operation of the act, among which was Washington county. By the Act of April 26, 1850, P. L. 615, the provisions of the act of 1843 were extended to Washington county. The special Act of March 30,

1859, P. L. 309, relating to Washington county, was extended by the Act of March 12, 1860, P. L. 144, to Lycoming county, and made it the duty of supervisors and street commissioners to keep in repair all bridges built by the county. In a recent case, Whitmire v. Township of Muncy Creek, 17 Pa. Superior Ct. 399, which grew out of the same accident as that in which the plaintiff was injured, the sixth section of the act of 1859 was construed, and it was held that the township's supervisors were not agents of the county commissioners in making repairs to a county bridge, and that the duty of repairing and consequently of inspecting was primarily on the township. The construction given the section is clearly right, and nothing can profitably be added to what is said on the subject by the learned president of the Superior Court.

There was no evidence to sustain the contention that the original construction of the bridge had been defective. The bridge was built in the manner in which bridges were commonly built at that time, by mortising the timbers. Greater strength and durability is now secured by the use of angle blocks, but their use was then unknown. The strength of the bridge was ample until the timbers were weakened by decay and were subjected to a severer strain by the use of traffic engines. As there was the duty of inspection, the deterioration of the timbers should have been known to the supervisors. They had knowledge that the use of traction engines in the township had become general, and that their transportation had been for many years an ordinary use of the roads of the township. They should have provided against dangers from this ordinary and reasonable use of the bridge.

To what extent the plaintiff was injured, and whether his physical condition at the time of the trial was the direct consequence of his injuries by the accident were questions for the jury. They were carefully submitted in a charge that fully protected the defendant's rights.

The judgment is affirmed.

Schoales, Appellant, *v.* Order of Sparta.

Beneficial associations—Act of April 6, 1893, *P. L.* 7—*Person entitled to fund—Sister—Friend.*

A member of an unincorporated beneficial association named his wife as beneficiary in the certificate and she so remained for eighteen years when she died. At the time when the contract was made with the association a member had a right to change the beneficiary and designate another. After the death of his wife the member substituted the name of a person described as his "nearest friend" as beneficiary. The change was made in accordance with the rules of the order and was approved by its officers. On the death of the member his sister claimed the proceeds of the certificate as his only surviving heir at law. *Held*, that she was not entitled to the fund and that it was payable to the person whose name had been substituted in the certificate.

Beneficial societies—Beneficiary—Act of April 6, 1893, *P. L.* 7—*Act prospective not retrospective.*

The Act of April 6, 1893, P. L. 7, limiting the payment of death benefits by beneficial societies to "families, heirs, blood relatives, affianced husband or affianced wife of, or to persons dependent upon the member," is prospective in its operation and not retrospective and does not affect the rights of holders of certificates issued prior to that time.

Beneficial societies—Certificates—Beneficiary—Heir at law—Title to fund.

The heir at law of the holder of a death benefit certificate in a beneficial society, is without standing to question the designation of a beneficiary by the deceased, notwithstanding she is within a class from which the member might have made his selection under the act of April 6, 1893.

Argued March 23, 1903. Appeals, Nos. 331 and 339, Jan. T., 1902, by plaintiff, from judgment of C. P. No. 1, Phila. Co., June T., 1902, No. 3332, on demurrer in case of Susan Schoales in her own right as heir at law of Francis H. Watt v. Order of Sparta. Before MITCHELL, FELL, BROWN, MESTREZAT and POTTER, JJ. Affirmed.

Assumpsit by Susan Schoales, sister and sole heir at law of Francis H. Watt, to recover the amount of death benefit certificate on the life of Francis H. Watt, a member of the Order of Sparta, an unincorporated beneficial association. The Order of Sparta paid the money into court and an issue was framed between Susan Schoales and William Graham.

Graham demurred to the statement. The court sustained the demurrer and ordered the fund amounting to $2,366.20 to to be paid to William Graham, the beneficiary named in the certificate. Plaintiff appealed.

Error assigned was in entering judgment for defendant on the demurrer.

George Bradford Carr, for appellant.—Upon the death of a member where the person claimed to be designated as beneficiary is outside of a class eligible as beneficiaries, the members, heirs, at law who are within such class, are entitled to the insurance: Baldwin v. Begley, 56 N. E. Repr. 1065; Daniels v. Pratt, 143 Mass. 216 (10 N. E. Repr. 166); Grand Lodge A. O. U. W. v. Gandy, 53 Atl. Repr. 142.

Leo Belmont, of *Belmont & De Young*, for appellee.—The insured had an insurable interest in his own life and could insure the same and make any one he chose beneficiary: Overbeck v. Overbeck, 155 Pa. 5; Scott v. Dickson, 108 Pa. 6; Chidester v. Yard, 155 Pa. 483.

The holder of a certificate in a beneficial society made payable to him by the assured by assignment or originally, when not contrary to the rules and by-laws of the society, is entitled to receive the money represented by the certificate: Fisk v. Equitable Aid Union, 20 W. N. C. 290; Jinks v. Banner Lodge, 139 Pa. 414; Maneely v. Knights of Birmingham, 115 Pa. 305.

Where a member of a beneficial association, when he became such member, had the right to designate as a beneficiary a person who was neither a member of his family nor an heir nor a blood relation nor an affianced wife, nor a person depending upon him, he is not deprived of such right by the act of April 6, 1893, which is prospective in its operation: Thomeuf v. Knights of Birmingham, 12 Pa. Superior Ct. 195.

Opinion by Mr. Justice Potter, May 4, 1903:

The Order of Sparta is an unincorporated association, organized in Philadelphia on November 18, 1879, "to unite fraternally men," etc., for the purpose of paying a death benefit of $2,500 to its members.

Francis H. Watt became a member of the order on May 26, 1882, his certificate number being 1059. His wife, Sarah A. Watt, was made the beneficiary in the certificate, and remained such during a period of eighteen years, when she died. At the time when the contract was first made with the association, the member had the right to change the beneficiary and designate another. After the death of his wife, Francis H. Watt did change the beneficiary as named in his certificate, and substituted the name of William Graham as his "nearest friend." This change was made in accordance with the rules of the Order, and was approved by its officers. On July 15, 1902, Francis H. Watt died. Immediately thereafter his sister Susan Schoales gave notice to the Order of Sparta, that she claimed the proceeds of the certificate upon the life of her brother, as his only surviving heir at law. Thereupon the Order of Sparta, upon its petition, was allowed to pay the money into court. An issue was framed by agreement between the respective parties, to ascertain which of them was entitled to the fund. Susan Schoales as plaintiff filed her statement, to which William Graham, as defendant, filed a demurrer. The court below sustained the demurrer, and afterwards directed the money which had been paid into court, to be paid to William Graham. Appeals were taken by Susan Schoales, both from the judgment of the court below in sustaining the demurrer, and from the order directing payment of the fund to William Graham.

It is contended here on the part of appellant, that as William Graham was not related to Watt by blood or marriage, and was not dependent upon him, he could not be properly designated as a beneficiary, by reason of the provisions of the act of April 6, 1893. This act limits the payment of death benefits by beneficial societies to "families, heirs, blood relatives, affianced husband or affianced wife of or to persons dependent upon the member."

And it is further contended that the appellant, being the sister, heir at law, and blood relative of Francis H. Watt, deceased, and within one of the classes of persons designated in the act of assembly, is therefore entitled to receive the proceeds of the certificate, less the payments made by Graham for dues and assessments, with interest thereon, paid to keep Watt in good standing until the time of his death. But to give to the

act of 1893 any such effect as would take from the member the right which he clearly had prior to the passage of the act, to change the beneficiary, would be to give it a retrospective effect. Such a construction is not to be adopted unless the legislative intent to give the statute such operation is clear. The Superior Court said in reference to this act, in Wolpert v. Knights of Birmingham, 2 Pa. Superior Ct. 564, "The language of this statute is too plainly prospective in its operation to admit of any doubt." And again in Thomeuf v. Knights of Birmingham, 12 Pa. Superior Ct. 195, it is held that this act does not deprive a member of a beneficial association of the right which he had before its passage to designate or change the beneficiary.

We agree with the view that the legislature did not intend by the act of April 6, 1893, to affect the rights of holders of certificates issued prior to that time.

In any event, the appellant here would seem to be without standing to question the designation of a beneficiary by the deceased. It is true that she is within a class from which the member might have made his selection had he seen fit to do so. But he did not indicate her as his choice. In the exercise of the right for which he had contracted with the association in 1882, almost eleven years before the passage of the act of 1893, he after the death of his wife designated his "nearest friend," William Graham, as beneficiary in her stead. The association raises no question as to the rightfulness of his action in so doing, and we do not think the appellant has any standing to complain. Her mere relationship as sister is not sufficient, and she has nothing more.

The assignments of error are overruled, and the judgment is affirmed.

Croasdale *v.* Von Boyneburgk, Appellant.

Equity—Account—Joint owners of tugboat—Managing owner—Salary as such.

Where one of the owners of a tugboat, the boat being held by all the owners as tenants in common, proceeds against one of the other owners for an accounting, the joint owner whose duty it is to account, cannot claim a salary as managing owner, where it appears that no salary was ever paid to the managing owner of the boat; that the accountant as managing owner employed agents of the tugboat, who performed the duties as such, and were compensated by commissions upon the gross sums they handled; that the business of the boat was carried on at the office of one of the agents, the managing owner having no office; that the agents kept the accounts of the boat's receipts and expenditures, paid the crew, and some of the bills, solicited and obtained business for the boat and had general charge of her; and where it further appears that it was the usual and customary arrangement in the business, that the managing owner should serve without charge, and the agent of the company be paid a percentage upon gross receipts.

Joint owners of tugboat—Managing owner—Duty to commence criminal prosecution.

It is not the duty nor within the authority of the managing owner of a tugboat to institute a criminal prosecution against one of the joint owners alleged to be a defaulter, and he cannot claim a credit against his co-owners for the expense of such a criminal prosecution.

Joint owners of tugboat—Managing owner—Duty to account—Costs.

It is the duty of a managing owner of a tugboat to account to all the owners; and when he fails in the performance of this duty, and is compelled by legal proceedings to render an account, he should be visited personally with the costs.

Practice—Supreme Court—Assignment of errors—Rule 11 *and Equity Rule* 92.

Equity Rule 92 requires the appellant to file in the court below "a brief statement of the errors he alleges to have been made by the order or decree appealed from." Rule 11 of the rules of the Supreme Court requires the appellant to "specify in writing the particular errors which he assigns, and to file the same in the prothonotary's office" of the Supreme Court. Failure to observe these two rules in equity cases may result in the appeal being non prossed.

Argued March 23, 1903. Appeal, No. 335, Jan. T., 1902, by defendant, from decree of C. P. No. 3, Phila. Co., Dec. T., 1898, No. 923, in case of Olney Croasdale v. F. Albert Von

Boyneburgk et al. Before MITCHELL, FELL, BROWN, MESTREZAT and POTTER, JJ. Affirmed.

Bill in equity for an account.

On exceptions to the report of Edwin Jaquett Sellers, Esq., master, the court, MCCARTHY, J., filed an opinion in part as follows:

The first question raised is, should the credits claimed by the accountant for disbursements, in connection with the criminal prosecution of Stotsenberg for alleged embezzlement of moneys belonging to the owners of the John Reese, be allowed?

The learned master finds as matter of law that the credits should be allowed, because the accountant, "as managing owner of the tugboat, was morally bound and legally authorized" to detect and prosecute a co-owner for embezzlement of the owners' money, and to charge the owners with the expense thereof, including fees of counsel, detectives, expert accountants, clerks, etc.; and the subsequent abandonment of the proceedings does not relieve them, such efforts being in the interest of justice and for the special benefit of the owners. He cites no authority, nor does he offer any reasoning in support of this novel view of the duties of a managing owner.

The Supreme Court of Pennsylvania has affirmed the decision of this court that the owners of the John Reese are tenants in common of a chattel. It is an incident of such ownership that common consent is necessary to common enjoyment of the property, and the prior consent of each owner is necessary to bind him to any use of the chattel or expenditure on account of it. In case of vessels, however, the employment of which is deemed by commercial nations a matter of public benefit, after the consent to the appointment of the managing owner is established, the consent of all the owners to his duly authorized acts will be presumed, and they will be bound by all contracts made by him on their behalf within the scope of his authority: Maclachlan, Merchant Shipping (4th ed.), 190. This extends to whatever concerns the employment of the ship, as appointing its master and officers, seeing that the ship is properly repaired, equipped and manned, employing tradesmen to furnish supplies and repairs, procuring freights, preserving the

ship's papers, making necessary entries, adjusting freights and averages, disbursing and receiving moneys, keeping and adjusting the accounts between the parties interested, and the like: Abbott, Merchant Ships (14th ed.), 130; Maclachlan, Merchant Shipping (4th ed.), 186. The institution of proceedings at law, however, is not within the authority of a managing agent, being foreign to the purpose of his employment, and it has accordingly been held that he cannot pledge the credit of the co-owners for the expenses of a lawsuit: Abbott, Merchant Ships, supra, citing Campbell v. Stein, 6 Dow. 116; The Bellcairn, 5 Asp. M. C. 582. A fortiori, it is not within the scope of his authority to institute a criminal prosecution, and the consent of the owners to such action on his part cannot be presumed from the fact of his employment as managing owner. The consent of each must be shown to justify charging him with the incidental expenses. The learned master finds that the criminal prosecution against Stotsenberg was instituted and prosecuted without the authority or consent of his wife, or of the plaintiff, her assignee. He also finds that the prosecution was abandoned. It was therefore of no benefit to the owners, who could only have been benefited by it, as members of the community, through the conviction and punishment of the offender, not in their private capacity as owners, and the case not having been brought to trial, there is nothing to show that the proceeding was founded upon any proper cause. Under such circumstances, there is no reason in law or equity why any part of the expenses incurred in connection with this criminal prosecution should be imposed upon Mrs. Stotsenberg or the plaintiff. The master finds the total of these expenses to be the sum of $409.60. Credits claimed for all the items aggregating this total must be disallowed to the accountant as against the plaintiff.

The second question raised by the exception is, should the credits claimed by the accountant for the payment by him after August 17, 1897, of bills contracted on account of the employment of the John Reese prior to that date, be allowed?

The plaintiff contends that these credits should not be allowed, because "from that time, namely, August 17, 1897, the interest in said vessel changed," and he should not be charged with expenses of the boat "contracted prior to the

time he became entitled to share in the profits." This, however, is an error in fact; the interest was not changed until the plaintiff purchased Mrs. Stotsenberg's share on December 19, 1898. The date of August 17, 1897, is that upon which the accountant became the managing owner, and is fixed by the decree as the date when the accounting should begin, because it is his own stewardship of which he is required to render an account, and not that of another. The plaintiff in acquiring the ownership of Mrs. Stotsenberg's share in the John Reese, acquired also the net earnings or dividends accrued upon that share to the date of his purchase. In determining what the net earnings are, the accountant is entitled to credit for any due and proper application of the earnings of the tugboat received by him. The payment of a valid and subsisting indebtedness of the owners legitimately incurred in connection with the employment of the boat is a due and proper application of her earnings, and it is a matter of no moment when that debt was contracted. Here the validity of the debts is not questioned; the accountant has actually paid them as justly due by the owners, and he is entitled to credits for such payments, as the learned master has properly found.

On the other hand, the decree requires the defendant, Von Boyneburgk, to account for all sums of money which have been received and collected by him as managing owner from August 17, 1897, on account of the use and hire of the said tugboat or to the use of her owners. The learned master has found that since the date named the accountant received and has failed to account for $400 belonging to the owners of the tugboat, and accordingly has surcharged him properly with that amount.

The third question raised by the exceptions is, should the credits claimed by the accountant for his salary as managing owner be allowed in addition to the credits claimed by him for commissions paid to agents?

The master finds as matter of fact that at a meeting of the owners of a majority of interest in the John Reese, held in August, 1897, it was agreed that the accountant as managing owner should receive $50.00 per month for his services, and as matter of law that the owners of a majority of interest were authorized to enter into an agreement to pay the managing

owner whatever salary they might agree upon; and that Mrs. Stotsenberg and the plaintiff, as her assignee, are bound by the action of the majority.

He does not find that Mrs. Stotsenberg was present or represented at the meeting referred to; the testimony shows she was not. He does not find that the action of the meeting in fixing a salary for the managing owner was communicated to her, or that she ever had actual knowledge of it; there is nothing in the evidence from which such knowledge can be inferred. Supposing her to have had access to the managing owner's accounts, she could have gathered from them no knowledge of this matter, for his first entry of credit for salary bears date March 1, 1899, the item reading, "By accountant's wages, August 17, 1897, to March, 1899, eighteen and a half months, at $50, $925." This entry, according to its date, was made about two months and a half after Mrs. Stotsenberg had sold out her interest to the plaintiff, and ten days after the plaintiff had filed his bill in the present action praying for an account.

It has been sufficiently shown before that a majority of the owners in common of a chattel cannot bind the minority nor any single owner, without his consent. It may be that consent will be presumed in the absence of knowledge. There is nothing in the evidence on which to base any presumption that either the plaintiff or his assignor had any knowledge of this claim before the actual stating of the account before the master.

The learned master finds as a fact that no salary was ever paid to any other managing owner of said tugboat. In the absence of knowledge and consent on her part to a change in the arrangement, it would be inequitable and unjust to hold Mrs. Stotsenberg and her assignee, the plaintiff, to any different arrangement from that with which she was familiar, which had her consent and which appears to be the usual and customary arrangement in this business, namely, that the managing owner should serve without charge, and the agents of the boat should be paid a percentage upon such gross receipts as resulted from their agency.

The learned master finds as matter of fact that the accountant employed Walker and afterwards Reynolds as his successor

"merely as assistants or employees of the owners" at a commission of five per centum upon their gross collections; and, as matter of law, that he was authorized to employ them, and that his selection is presumed to have been ratified by the other owners, as no objection was made, and hence he is entitled to credit for the payments made to them. The master nowhere finds the facts upon which he bases his conclusion that the persons named were merely assistants, nor does he find the facts showing the nature of their employment and duties or the character of the work carried on by the managing owner. To ascertain these facts we must look into the evidence, and that shows that Walker, at the time he was employed about the business of the John Reese, was in business as a tugboat agent and had charge of several other tugboats besides the Reese; that he attended to his duties as agent for the Reese in the same manner as he attended to like duties for other boats; that the business of the boat was carried on in his office, the managing owner not having any office; that Walker kept accounts of her receipts and expenditures, paid the crew, paid some of the bills, hustled to get work for the boat and had general charge of her, and was paid for his services a commission of five per centum upon the gross receipts. Reynolds, his successor, performed the like duties. He acted in the same capacity to this particular boat as he did in connection with other boats which he had charge of. He was paid also a commission of five per centum, which he testified is a fair commission for the work. The accountant had a general superintendence of the business and directed Walker and Reynolds in their work; he also seems to have assisted in getting employment for the tugboat and to have paid some of the bills; but the character, amount and extent of work done by him independently of his agents does not clearly appear in the evidence.

There is no magic in a name. The facts show that whether Walker and Reynolds were what are technically known in the business as "agents" of the tugboat John Reese, or were "merely the assistants or employees of the owners," of that vessel as found by the master, they discharged such duties as are ordinarily performed by tugboat agents and were compensated in the usual way by commissions upon the gross sums

they handled. These commissions having been paid, it would be inequitable, as already found, to charge what would virtually be a second compensation for the same services against the plaintiff, neither he nor his assignor having ever consented thereto. The credits claimed for all payments of salary, which appear from the account filed to aggregate the sum of $1,575, should therefore be disallowed as against the plaintiff.

The fourth question raised by the exceptions is, should the costs of this suit be paid by the defendant Von Boyneburgk in his individual capacity, or in his representative capacity as managing owner of the John Reese?

The master finds as matter of law that the accountant is liable for all costs by reason of his failure to account until compelled to do so by the order of this court; and that the plaintiff should be relieved from contribution to the costs of this proceeding, as it would be inequitable to tax him, as he is free from blame and was compelled to seek redress in court. He also affirms the eighth request for findings of law to the effect that all costs in this case shall be paid by the accountant, "but with the modification that the costs shall be paid by the said F. Albert Von Boyneburgk as managing owner, but exclusive of the right of said managing owner to charge the plaintiff with any proportion thereof."

As already stated, one of the cardinal duties of the ship's husband or managing owner is to keep and adjust accounts between the parties interested. The owners have a constant right to inspect his accounts, "and if they are driven by his refusal or delay to seek an account in a court of equity, he will be visited with the costs and with interest on any balance of money retained in his hands for this neglect of his duty:" Maclachlan, Merchant Shipping (4th ed.), 189. It was, therefore, Von Boyneburgk's duty to account. His neglect or refusal to do it caused this suit. For this dereliction of duty he should be punished by imposing upon him all the costs and interest upon the amount retained, to be paid out of his own individual pocket. To permit him to pay these penal charges out of the funds in his hands as managing owner would be to inflict upon each of his codefendants, who had no duty to account and are not in the least default, the same punishment with the wrongdoer and thus confound the innocent with the

guilty. The master justly finds it would be inequitable to tax the plaintiff with any of the costs, as he is free from blame. It would be just as inequitable to tax them upon such of the other owners as are equally blameless.

The court entered a decree that the defendant F. Albert Von Boyneburgk pay to the plaintiff $2,317.68, and that the defendant personally pay the costs. Defendant appealed.

Error assigned was the decree of the court.

Thomas Diehl, with him *J. Warren Coulston*, for appellant.

E. Cooper Shapley, with him *Edwin C. Nevin*, for appellee

Opinion by Mr. Justice Mestrezat, May 4, 1903:

The facts found and the authorities cited by the learned trial judge in his opinion disposing of the exceptions to the master's report are ample to sustain the decree entered by the court below.

The owners of the tugboat, John Reese, held the property as tenants in common: Croasdale v. Von Boyneburgk, 195 Pa. 377. It appears from the evidence and was found as a fact by the master that no salary was ever paid any managing owner of the John Reese. The accountant as managing owner employed two agents of the tugboat who performed the duties as such and were compensated by commissions upon the gross sums they handled. The business of the boat was carried on at the office of one of the agents, the managing owner having no office. The agents kept the accounts of the boat's receipts and expenditures, paid the crew, paid some of the bills, solicited and obtained business for the boat, and had general charge of her. It was found as a fact that it was the usual and customary arrangement in the business that the managing owner should serve without charge and the agent of the company should be paid a percentage upon such gross receipts as resulted from the agency. It thus appears that under the facts disclosed by the evidence and found by the court below, the duties of the managing owner were not performed by Von Boyneburgk but by the agents who received the commissions to which he claims he is entitled for attending to the affairs or the business of the boat.

The above recited facts would clearly preclude the accountant from claiming a salary for his services as managing owner. He relies, however, on an alleged agreement by the owners of a majority in interest in the tugboat as the basis of his claim for compensation for his services. The evidence shows that neither Mrs. Stotsenberg nor her assignor, the plaintiff, was represented at any meeting when the alleged agreement was made, nor that they, or either of them, had any knowledge that such an agreement had been entered into with Von Boyneburgk. It is equally clear that neither the plaintiff nor his assignor acquiesced in the agreement or consented that Von Boyneburgk should receive a salary for his services as managing owner. But if it be conceded that the majority interest agreed to compensate him for his services and that the minority interest could be bound thereby, the managing owner, however, would be compelled to perform those services before he would be entitled to the compensation. This, as we have seen, he did not do. The two agents conducted the business and they were paid by commissions upon the gross sums they handled. As said by the court below, these commissions having been paid, it would be inequitable to charge what would virtually be a second compensation for the same services against the plaintiff, neither he nor his assignor having ever consented thereto. It is quite obvious that the appellant did not regard himself as entitled to, nor expect, compensation for his services from the fact that his account shows that he made no charges for them against the boat until more than eighteen months after he assumed the management of the boat and after Mrs. Stotsenberg had sold her interest and this proceeding had been instituted. This taken in connection with the fact that an agent performed the duties and was compensated in the manner in which the managing owner would be paid were he to receive compensation, is convincing proof that the appellant's right to claim payment for services did not occur to him until the appellee compelled him to account for his management of the business of the boat.

The authorities cited by the trial judge sustain him in holding that it was not the duty nor within the authority of the appellant as managing owner to institute a criminal prosecution against Stotsenberg; and hence as against the non-assenting owner of an interest in the vessel, he is not entitled to a

credit in his account for the costs expended in the litigation. We can see no force in the suggestion of the master that the appellant as managing owner was morally bound to detect and prosecute a copartner for an alleged embezzlement which occurred some time prior to the date when the affairs of the boat were placed in the hands of the appellant. The purpose of a criminal prosecution is to punish the offender for violating the laws of the commonwealth, and not to enforce the payment of money nor, as in civil proceedings, to restore to the owner the property of which he has been defrauded. The criminal process of the court should not be invoked for any such purpose. While the appellant, like any other person, could have instituted the prosecution against Stotsenberg, it was clearly not his duty as managing owner to do so. The scope of his employment did not include a duty nor the authority to prosecute at the expense of the boat owner a delinquent or defaulting owner of a minority interest for the violation of the criminal laws of the state. Such action might be most commendable in him as a citizen who is looking after the morals of the community, but as the managing owner of a tugboat his employers would doubtless prefer that he should not consider it a part of his employment to institute criminal prosecutions against them, or if he did so, that they should not be compelled to reimburse him for such services or protect him against costs he was properly condemned to pay.

The costs of this proceeding were properly disposed of by the court below. It was clearly the duty of the managing owner to account not only to the plaintiff but to all the owners, and when he failed in the performance of this duty and was compelled by legal proceedings to render an account he should be visited personally with the costs.

No assignments of error were filed in this case and the appellee would have been entitled on motion to a judgment of non pross. under rule 11. The learned counsel for appellant misapprehended the purpose of rule 92, which requires the appellant to file in the court below "a brief statement of the errors he alleges to have been made by the order or decree appealed from." This, however, does not relieve the appellant from his duty under rule 11 to "specify in writing the particular errors which he assigns, and to file the same in the prothonotary's

office" of this court. On an appeal, we can consider only such errors in the record as have been properly assigned under the last mentioned rule. A failure to observe either of these rules may, at the instance of the other party or on the court's own motion, impose on the offending party the penalty of having his writ non prossed.

The decree is affirmed.

Thaddeus Dochkus *v.* Lithuanian Benefit Society of St. Anthony, Appellant.

Church law—Roman Catholic Church—Independent congregation—Title to real estate.

Church congregations may hold catholic doctrines just as other denominations hold catholic doctrines, but ecclesiastically and in sight of the Roman Catholic Church, may have no existence and not be recognized by the papal authority.

Where a congregation worships according to the forms and rites of the Roman Catholic Church, but it is denied that it adheres to and is connected with the ecclesiastical body known as the Roman Catholic Church or has ever placed itself by any voluntary act of its own under the power of the head of the diocese of the church, and where it is alleged that the Archbishop of the diocese refused to permit the congregation to purchase a property; that in defiance of and in opposition to his refusal it bought the property and paid for it with money of the congregation; that it employed the pastor without any knowledge that he had been assigned by the Archbishop and paid him the salary he demanded; and that in every respect it acted independently of the authority of the Roman Catholic Church, the court is without authority to decree that a trustee holding title to the church property for the use of the congregation shall convey it to the Archbishop of the diocese.

If a congregation is formed for the purpose of religious worship according to the faith and rites of the Roman Catholic Church, has accepted the pastor assigned to it by the Archbishop of the diocese, has placed itself under the authority of the Archbishop and submitted itself to his authority in all ecclesiastical matters, the title to its property must be taken and held as provided by the canons of the Roman Catholic Church. The property acquired by the congregation under such circumstances is the property of the church and is subject to its control and must be held in the manner directed by its laws. A congregation cannot divorce itself from the church or form an independent organization and retain the ownership of the property.

Ecclesiastical organization—Church government—Independent organization.

Whenever a church or religious society has been originally endowed in connection with or subordination to some ecclesiastical organization and form of church government, it can no more unite with some other organization or become independent, than it can renounce its faith or doctrine, and adopt others.

Evidence—Church membership.

Where a bill in equity to compel the conveyance of a church property by a trustee to the Archbishop of the diocese avers that a majority of the members of the congregation desired the title conveyed to the Archbishop and this allegation is denied in the answer, the court is in error in excluding the testimony of the secretary of the congregation as to the number who favored the title remaining in the name of the trustee.

Argued March 24, 1903. Appeal, No. 47, Jan. T., 1902, by defendants, from decree of C. P. No. 2, Phila. Co., Sept. T., 1900, No. 405, in case of Thaddeus Dochkus et al. v. The Lithuanian Society of St. Anthony, et al. Before MITCHELL, FELL, BROWN, MESTREZAT and POTTER, JJ. Reversed.

Bill in equity to compel the conveyance of a church property to Patrick John Ryan, Archbishop of Philadelphia.

From the record it appeared that in the year 1893 the members of the congregation of the church of St. Anthony purchased a church edifice and dwelling house on Fifth street south of Carpenter street in the city of Philadelphia. At the time of the purchase of the property the congregation requested permission from the Archbishop of the Catholic Church of Philadelphia to locate in the property and to purchase the same for the use of the congregation. Permission to purchase was refused, but permission was granted temporarily to locate in the building until the congregation could find a more suitable location.

The members of the congregation proceeded in the purchase of the church edifice and not being able to place the title in the name of the Archbishop selected the Lithuanian Benefit Society of St. Anthony, a benefit society made up of members of the congregation as trustee to hold the legal title.

On September 3, 1900, the congregation received a letter from the Archbishop commanding that the title to the property should be placed in his name. Members of the congregation

objected to complying with this request, and a bill was filed by members of the congregation averring that a majority of the members desired to comply with the request of the Archbishop setting out the refusal of the trustee to comply therewith and praying for a decree directing the trustee to convey the legal title to the premises to Patrick John Ryan, Archbishop of Philadelphia. The court, WILTBANK, J., entered a decree in accordance with the prayer of the bill.

When Charles C. Unick, secretary of the congregation, a witness called by the defendants, was on the stand, he was asked the following questions:

Q. How many members of the congregation favor the title remaining in the name of the St. Anthony Society? Objected to. Objection sustained. Exception noted for the defendants. [3]

Q. How many of the congregation desire to conduct an independent church? Objected to. Objection sustained. Exception for defendants. [4]

Q. How many of the 350 members are still in favor of conducting an independent Catholic Church? Objected to. Objection sustained. Exception for defendants. [5]

Q. Will you kindly tell me where the congregation wants the title to the property to be placed? Objected to. Objection sustained. Exception for defendants. [6]

Errors assigned were in entering the decree and in refusing to permit Charles C. Unick, secretary of the congregation of the church, to answer the questions set forth in the third, fourth, fifth and sixth assignments of error.

Harry A. Mackey, with him *James Gay Gordon* for appellant.

John W. Speckman, with him *Anthony A. Hirst*, for appellees.

OPINION BY MR. JUSTICE MESTREZAT, May 4, 1903:

The determination of the issue raised by the pleadings in this case required the court below to pass on two questions: (1) Had the congregation worshiping at St. Anthony Church placed itself under the ecclesiastical authority of the Roman Catholic Church as represented by the Archbishop of Phila-

delphia? (2) If it had not done so, did a majority of the congregation desire to have the church property transferred to the Archbishop, to be held by him for the Roman Catholic Church? The learned trial judge, as well as both parties, tacitly conceded that these were the questions to be considered and determined by the court below. In passing on the questions, the trial judge fell into an error in assuming that "the congregation of St. Anthony was a Roman Catholic congregation" and that it adhered to the Roman Catholic Church. On this assumption, the court held that the congregation was necessarily connected with and subject to the authority of the Archbishop of this diocese of the Roman Catholic Church. As stated by the Archbishop in his testimony, congregations "may hold catholic doctrines just as other denominations hold catholic doctrines, but ecclesiastically and in sight of the Roman Catholic Church, they have no existence; they are not recognized by the papal authority." That is unquestionably correct, and is so conceded by the appellants, whose contention is that the congregation of St. Anthony, while holding catholic doctrines, has no existence "ecclesiastically and in the sight of the Roman Catholic Church." Hence, the appellants deny the right of the church to compel a conveyance to it of the property acquired by the congregation of St. Anthony as a place of worship.

The error in assuming that as the St. Anthony congregation was a Roman Catholic congregation it was, therefore, subject to the authority of the Roman Catholic Church affected the entire proceeding in the court below and resulted in the erroneous rulings by the trial judge on the admission of testimony covered by the assignments of error. The appellants concede that the congregation worships according to the forms and rites of the Roman Catholic Church, but they deny what the trial judge assumed to be a fact, that the congregation adhered to, and was connected with, the ecclesiastical body known as the Roman Catholic Church, or had ever "placed itself by any voluntary act of its own under the power of the head of the diocese" of the church. They allege that the Archbishop of the diocese refused to permit the congregation to purchase the property now in dispute; that in defiance of, and in opposition to, his refusal it bought the property and paid for it with money of

the congregation; that it employed the pastor without any knowledge that he had been assigned by the Archbishop, and paid him the salary he demanded; and that in every respect it has acted independently of the authority of the Roman Catholic Church. If the contention of the appellants be true, and it is solely a question of fact to be determined from the evidence, the congregation is entitled to control the property and to direct in whom the title shall be placed for its use. On the other hand, if, as claimed by the appellees, the congregation was formed for the purpose of religious worship according to the faith and rites of the Roman Catholic Church, had accepted the pastor assigned to it by the Archbishop of the diocese, had placed itself under the authority of the Archbishop and had submitted itself to his authority in all ecclesiastical matters, then the title to the property must be taken and held as provided by the canons of the Roman Catholic Church. The property acquired by the congregation under these circumstances is the property of the church and is subject to its control and must be held in the manner directed by its laws. The congregation cannot divorce itself from the church, or form an independent organization and retain the ownership of the property. As testified by the Archbishop, when the congregation renounces its connection with the church it has no longer any existence as a Roman Catholic Church, and consequently has no authority to direct or control the property. "Whenever a church or religious society has been originally endowed in connection with, or subordination to some ecclesiastical organization and form of church government," says SHARSWOOD, J., in Roshi's Appeal, 69 Pa. 462, "it can no more unite with some other organization or become independent, than it can renounce its faith or doctrine, and adopt others."

The only assignments of error which conform to the rules of court and which will be considered here are the third, fourth, fifth and sixth, and they must be sustained. These assignments allege error in not permitting the appellants to introduce evidence to show that a majority of the congregation objected to placing the title to the church property in the hands of the Archbishop of Philadelphia. The bill averred that of the 1,200 members of the congregation, 1,100 were loyal to the Roman Catholic Church and were desirous of having the title to

the property conveyed to the Archbishop. The answer denied absolutely this allegation and, on the contrary, averred that a very large majority of the congregation "are opposed to a transfer or assignment of the title to the church edifice to either the pastor, the said Joseph Kaulakis, or to the Archbishop of Philadelphia." This was, therefore, a material question in the case and one on which the learned trial judge made a specific finding, which was in the language of the bill and adverse to the contention of appellants. The twenty-fifth finding of fact by the trial court is as follows: "The congregation of the Church of St. Anthony is composed of about 1,200 members, of which number 1,100 are loyal to the church and are desirous of having the title to the church property conveyed to the Archbishop of Philadelphia, according to the laws of the church." The objection to the testimony made by the counsel of appellees was that the witness did not have sufficient knowledge of the subject to qualify him to testify, and further that as the witness had admitted that the congregation was Roman Catholic, he could not be permitted to testify that the congregation was acting independently of the ecclesiastical authority of that church. The latter of these objections we have considered and held to be untenable. Neither is the other objection well taken. The court could not assume that the witness did not know how many members of the congregation favored the title remaining in the name of the present trustee. The witness's knowledge of the fact could have been elicted on cross-examination or, if the appellees desired, on a preliminary examination. The ruling as disclosed by the record, therefore, is practically a denial of the right of the appellants to show the fact rather than the exclusion of the testimony by reason of the incompetency of the witness. If the trial judge was required to ascertain and determine, as he did, the views of the congregation as to the disposition of the church property, it is too clear for argument that it was error to reject the testimony offered by the appellants for that purpose.

The decree is reversed with a procedendo.

Jennings v. Union Traction Company, Appellant.

Negligence—Street railways—Injury to passenger—Contributory negligence.

Where a passenger on an open summer electric street car signals the conductor to stop at a crossing both before the car had reached the crossing and after it had passed the crossing, and the conductor either does not see or heed the signals, and the passenger then rises and stands at the extreme edge of the car with his face to the rear and his arm around a stanchion, and again signals the conductor when the car is well within the block, and the car is then suddenly stopped with a jar, and the passenger is thrown out and injured, the latter is not entitled to recover damages from the railroad company for his injuries. In such a case it is not the negligence of the company, but the contributory negligence of the passenger which caused the accident.

Mr. Justice Mestrezat dissents.

Argued Jan. 23, 1903. Appeal, No. 145, Jan. T., 1902, from judgment of C. P. No. 1, Phila. Co., Dec. T., 1897, No. 349, on verdict for plaintiff, in case of Michael Jennings v. Union Traction Company. Before Mitchell, Dean, Fell, Brown, Mestrezat and Potter, JJ. Reversed.

Trespass by passenger against a street railway company to recover damages for personal injuries. Before Bregy, J.

The facts are stated in the opinion of the Supreme Court.

Verdict and judgment of plaintiff for $12,000. Defendant appealed.

Error assigned was in refusing binding instructions for defendant.

Thomas Leaming, with him *Russell Duane*, for appellant, cited: Blue v. Penna. R. R. Co., 1 Mona. 757; Continental Pass. Ry. Co. v. Swain, 13 W. N. C. 41; Brown v. Barnes, Receiver, 151 Pa. 562; Jackson v. Philadelphia Traction Co., 182 Pa. 104; Penna. R. R. Co. v. Langdon, 92 Pa. 21; Drake v. Penna. R. R. Co., 137 Pa. 352.

John A. Ward, for appellee, cited: Kohler v. Penna. R. R. Co., 135 Pa. 346; Penna. R. R. Co. v. Weber, 76 Pa. 157;

Penna. R. R. Co. v. Werner, 89 Pa. 59; Bard v. Railway Co., 199 Pa. 94; Sweeney v. Union Traction Co., 199 Pa. 293; Smith v. Easton Transit Co., 167 Pa. 209.

Opinion by Mr. Justice Potter, May 11, 1903:

From the testimony of the appellee in this case, we learn that on September 19, 1897, between six and seven o'clock P. M., he was riding as a passenger upon an open summer car of the defendant company. The seats ran crosswise of the car and he was seated at the extreme west side, as the car was running north, on Eighth street, Philadelphia. Desiring to get off at Pine street he attempted to signal the conductor to stop the car before it had reached the crossing of that street, and again after it had crossed. The conductor either did not see or paid no attention to his signals and the car did not stop, but continued at a rapid rate on its way northward. Then the appellee rose from his seat, stood upon his feet at the extreme edge of the car, so close to it that he could put his right arm around the post or stanchion at the edge, and turned so as to face the rear of the car, and standing in this position called to the conductor to stop the car. It had entered upon the block, and the motorman did not stop until about half way through, when he stopped opposite the gate of the Pennsylvania Hospital. At or about the moment when the car stopped, the appellee fell from the car to the street, and sustained serious injuries. He claims that his fall was caused by an unusual jar or jolt in the stoppage of the car, and that this constituted negligence, upon which he based his action. The evidence upon the part of the plaintiff was that of himself and three passengers who were upon the car at the time of the accident.

The plaintiff said that the car "stopped suddenly," "stopped there very suddenly and knocked me right over," "he stopped the car very suddenly and that is what knocked me off."

Anthony Morley said that the car was running at a moderate rate of speed, but on cross-examination he said that the car might have run a car length and a half after the motorman began to slow down. Also that "it was a very sudden stop." "He did not see any one inconvenienced or discommoded besides Mr. Jennings, and was not hurt any himself, although he was standing up."

Louis Berger said that the plaintiff was thrown, or fell off, and that the stopping of the car moved witness a few inches out of his seat. He did not see any one else who fell or was inconvenienced in any way except plaintiff.

Henry McGinnis said that the car was going "pretty rapid." "The bell was rung very sudden and the car stopped very sudden." "It stopped with a jar. A very heavy jar." Plaintiff fell off the car. The stopping of the car jolted witness. His head went forward about six inches. The stop was "very sudden," "right sudden," "pretty sudden." After the brakes were applied the car might have run half its length or a little more. Some passengers complained about the sudden stoppage.

This was the substance of the entire testimony to sustain the plaintiff's allegation of negligence. We leave out of consideration the testimony on the part of the defendant, which was strongly to the effect that there was no unusual shock or jar in the stopping of the car, and that the appellee got down on the running board, and stepped off backward, before the car came to a stop.

But turning solely to the evidence on behalf of the plaintiff, does it disclose any negligence on the part of the defendant company?

The plaintiff urgently requested the conductor to stop the car at once when he saw it had crossed Pine street. To emphasize his demand he stood up. If he had remained sitting in his seat, and had been thrown from it, or from the car, or had been injured by the sudden stop while on the car, he would undoubtedly have had a good cause of action. Or if the car had been crowded, and there had been no vacant seat, he would have been justified in standing. But there was plenty of room. He had the whole seat to himself. Instead of remaining in it until the car stopped—as the notices and rules of the company, with which he was familiar, required him to do—he rose and stood upon his feet, at the extreme edge of the car. True he put his arm around the post, but the result showed that his hold was insecure, and afforded him no protection. In response to his imperative demand to stop the car, the conductor obeyed, and gave the signal, and the very thing which the appellee demanded was done and the car was stopped, but, as he says, suddenly and with a heavy jar. But he had demanded an un-

usual thing—the immediate stopping of the car in the middle of a square; and while other passengers may not have anticipated any such thing, yet he having demanded the stopping of the car then and there, was bound to expect that the car would in consequence of his emphatic demand, stop with some celerity. However sudden the stoppage was, it was not sufficient to injure any of the passengers who were seated, or even a passenger who was standing with his face towards the front of the car.

If the jar of the stoppage caused the fall of the plaintiff, as he testified, it must have been because he was not seated, as he should have been at that particular time, and under the circumstances, but was standing with his face to the rear of the car, and at the extreme edge of it, at the moment when, in response to his repeated and urgent requests, and when as he knew, or ought to have known, the car was about to be brought to a standstill. Can the motorman be said to be guilty of negligence for bringing his car quickly to a stop in response to the demand of the appellee because his doing so disturbed the balance of a passenger who was standing with his back to the front of the car, and upon its extreme edge? We do not see that the motorman had any reason to anticipate that any passenger would place himself in such a position. Unless it is the duty of a street railway to stop its cars in such a manner that persons standing up and riding backwards, shall not be jolted off their equilibrium, there is no negligence shown in this case. It is common knowledge that the momentum of a heavy moving car cannot be quickly overcome, as the appellee required should be done in this case, without producing something of a jerk. It is for the purpose among others of guarding passengers against danger from this cause, that the notices are posted requesting passengers to keep their seats until the car stops.

We are unable to see in the undisputed facts of this case, any cause for the very regrettable accident to the appellee, other than his exposure of himself to an entirely needless risk.

Under this view we are of opinion that the defendant was entitled to a binding instruction in its favor as requested in its third point for charge.

The specification of error is sustained, and the judgment is reversed, and is now entered for the defendant.

MESTREZAT, J., dissents.

Philadelphia *v.* Philadelphia Traction Company, Appellant.

Taxation—Street railways—Traction motor companies—Real estate—Act of April 21, 1858, *P. L.* 385.

The legislature has the power to authorize a municipality to impose a tax upon the real property of railway corporations situated in a city.

A traction motor company which leases and operates street railways in the city of Philadelphia is subject to the Act of April 21, 1858, P. L. 385, which provides that "the offices, depots, car houses, and other real property of railway corporations situate in said city, the superstructure of the road and water stations alone excepted, are and hereafter shall be subject to taxation by ordinance for city purposes."

Railroads—Railways—Words and phrases.

The words "railroad" and "railway" used in statutes of Pennsylvania will be considered as synonymous, and either will be held to apply both to steam railroads and street railways, unless there appears from the title of the act, its purpose or its context something to indicate that a particular kind of a road is intended.

Traction motor companies—Franchise—Street railways.

When a traction motor company operates a street railway, and leases the property and franchises of various railway companies, and operates them on its own account, it is exercising the franchise of a street railway company; and it enjoys the privileges granted to, and becomes subject to the liabilities imposed by law upon such company.

Argued Jan. 23, 1903. Appeal, No. 221, Jan. T., 1902, by defendant, from order of C. P. No. 1, Phila. Co., Dec. T., 1896, No. 708, making absolute a rule for judgment for want of a sufficient affidavit of defense in case of Philadelphia v. Philadelphia Traction Company. Before Mitchell, Dean, Fell, Brown, Mestrezat and Potter, JJ. Affirmed.

Scire facias on tax claim.

From the record it appeared that the tax for which suit was brought was levied upon defendants' car barn for the year 1896, The defendants filed an affidavit of defense, the material portion of which is as follows:

The defendant is a traction motor company, duly incorporated under the act of assembly of the commonwealth of Pennsylvania, entitled "An act to provide for the incorporation and

regulation of motor power companies for operating passenger railways by cables, electrical, or other means," approved March 22, 1887, for the purpose of "constructing and operating motors and cables for supplying motive power to passenger railways, and the necessary apparatus for applying the same."

Prior to the year 1896 the defendant had, in pursuance of powers expressly granted to it under said act, entered into certain contracts and leases with passenger railways in the city of Philadelphia; said railway companies were engaged in the business of carrying persons from place to place along the various streets of the said city, and under and by virtue of said contracts and leases it became, and was, the duty of the defendant to operate the cars over the lines of said various railways and to provide facilities and buildings necessary for such purpose. In order to carry out these objects and the duty which it owed to its said lessors and the public in the premises, it became necessary for the defendant company to acquire real estate and to erect thereon buildings for the housing, storage, and handling of cars when not in use and over night.

It accordingly purchased with a portion of the money representing its capital stock premises situate on the east side of Sixteenth street, from Jackson to Wolf, in the twenty-sixth ward of the city of Philadelphia, described in the lien, and constructed thereon the building mentioned in the scire facias, which is a car barn for the housing and care of its cars as aforesaid. The building is used for the storage of cars over night, which cars otherwise would have to stand upon the public streets. A small portion of it is used as the office and headquarters of the superintendent, who is actually in charge of the business at said car barn, looking after the said cars and dispatching them upon their various trips.

Said property was purchased and used for the purposes aforesaid, and was indispensably necessary to the operation of said defendant company's public franchises, and was used for no other purposes whatsoever. As said property represented part of defendant's capital stock, it was liable to pay, and has paid, to the commonwealth of Pennsylvania, a tax for said year upon the said property as part of such capital.

Said property was, and is, part of the public works of defendant, and used as such only, was essential to the carrying out

of the public purpose for which it was incorporated as aforesaid, and defendant received no profit or income therefrom by way of rental or otherwise. Defendant is advised, and therefore avers, that such being the case, the local authorities of the county are without power to impose the tax aforesaid, not only because it would result in double taxation upon the same property, contrary to the intent of the acts providing for the levying and collection of taxes, but because, if such property was subject to seizure and sale piecemeal, the defendant would be crippled in the exercise of the public functions required of it, and that such power has not been conferred upon the local authorities.

The court made absolute a rule for judgment for want of a sufficient affidavit of defense.

Error assigned was the order of court.

Ellis Ames Ballard, with him *Rufus E. Shapley*, for appellants.—Such property of corporations charged with the exercise of public or semipublic franchises as is appurtenant and indispensable to the performance of those franchises, is exempt from local taxation: Schuylkill Bridge Company v. Frailey, 13 S. & R. 422; Lehigh Coal & Nav. Co. v. Northampton County, 8 W. & S. 334; Northampton County v. Lehigh Coal & Nav. Co., 75 Pa. 461; Allegheny County v. Diamond Market Company, 123 Pa. 164; Gyger v. Phila. City Pass. Railway Company, 136 Pa. 96.

Mayne R. Longstreth, with him *John L. Kinsey*, city solicitor, and *James Alcorn*, assistant city solicitor, for appellee.—A traction motor company has the power to manufacture and sell motors and cables and other street car appliances, but this would only make it a manufacturing corporation, and as such it would still be subject to local taxation on its real estate: Hawes Mfg. Co.'s Appeal, 24 W. N. C. 302.

The real and personal property of a corporation may be taxed although it pays a tax on the stock which purchased it. The power of the legislature is as ample to tax twice as once, and it is done daily as all experience shows: Saving Fund v. Yard, 9 Pa. 359; West Chester Gas Co. v. Chester Co., 30 Pa. 232;

Carbon Iron Co. v. Carbon Co., 39 Pa. 251; Lackawanna Iron & Coal Co. v. Luzerne Co., 42 Pa. 425; Pittsburg, etc., R. R. Co. v. Com., 66 Pa. 73; Ebervale Coal Co. v. Com., 91 Pa. 47; Beechwood Ave., 194 Pa. 86.

That street railways are included in the word "railroad" as used in statutes, has been decided in the following cases, among others: Hestonville, etc., R. R. Co. v. City, 89 Pa. 210; Millvale v. Evergreen Pass. Ry. Co., 131 Pa. 1; Penna. R. R. Co. v. Pittsburg, 104 Pa. 522; Rafferty v. Traction Co., 147 Pa. 579; Old Colony Trust Co. v. Transit Co., 192 Pa. 596; Penna. R. R. Co. v. Electric Ry. Co., 152 Pa. 116; Cheetham v. McCormick, 178 Pa. 186.

Opinion by Mr. Justice Fell, May 11, 1903:

The city's claim for taxes is based on the Act of April 21, 1858, P. L. 385, which provides that: "The offices, depots, car houses, and other real property of railway corporations situate in said city, the superstructure of the road and water stations alone excepted, are and hereafter shall be subject to taxation by ordinance for city purposes." The power of the legislature to impose this tax and to delegate its authority to do so to the municipality has been settled by our decisions: Penna. R. R. Co. v. Pittsburg, 104 Pa. 522; Jermyn v. City of Scranton, 186 Pa. 595. Nor is this case within the class of cases in which it has been held that in the absence of an express declaration it will be presumed that the legislature did not intend to subject to taxation as real estate the property of a corporation that is essential to the exercise of its franchises and has once been taxed as a part of its capital. The power to tax and the intention to tax are clear, and the single question to be considered is whether a traction motor company which leases and operates street railways is within the provision of the act of 1858.

The act subjects to taxation for city purposes "the real property of railway corporations situate in the city, the superstructure and water stations alone excepted." It is argued that the exception of the "superstructure and water stations" indicates that steam railroads only were meant, since they are the only roads owning their right of way or having water stations. That the word "railway" is used is of little or no importance in

construing the act. The words "railway" and "railroad" have been used indiscriminately by the legislature, and have no strict technical meaning in our statutes. A number of passenger railways were incorporated about the time of the passage of the act of 1858, and some of them in the special acts of incorporation are designated as "railway companies" and some as "railroad companies." The rule established by our decisions is that these words used in the statutes will be considered as synonymous, and either will be held to apply to both kinds of roads, unless there appears from the title of the act, its purpose or its context something to indicate that a particular kind of a road is intended: Hestonville, etc., Railroad Co. v. Philadelphia, 89 Pa. 210; Gyger v. Phila. City Pass. Ry. Co., 136 Pa. 96; Cheetham v. McCormick, 178 Pa. 186; Old Colony Trust Co. v. Transit Co., 192 Pa. 596. The exemption from taxation of the superstructure and water stations clearly indicates that steam railroads were included, but it does not follow that passenger railway companies were excluded. The word used applies to both kinds of roads, and we see no ground on which it can be held that either is exempted from the operation of the act. An act similar to the one under consideration was construed in Penna. R. R. Co. v. Pittsburg, 104 Pa. 522. This act provides that "all real estate situated in said city owned or possessed by any railroad company shall be and is hereby made subject to taxation for city purposes, the same as other real estate in the city." It was held that the act applied to both steam railroads and passenger railways, and that under it the land, buildings and improvements thereon of the companies were liable to taxation for city purposes, although they were essential to the exercise of corporate franchises in the operation of the roads. There is no real distinction between these acts.

It remains to determine whether for the purpose of this inquiry there is a distinction between passenger railway companies and traction motor companies. Companies of the latter class are incorporated under the Act of March 22, 1887, P. L. 8, and the grant of power is to enter upon streets upon which passenger railways have been constructed, with the consent of the railway company, and to construct, maintain and operate thereon motors, cables, electrical and other appliances for the

traction of the cars of the passenger railways. They are given power to "lease the property and franchises of street passenger railways which they may desire to operate, and to operate said railways." By the Acts of May 15, 1895, P. L. 63 and P. L. 64, they are authorized to buy and own the franchises of street passenger railways, to lay out new lines, and to operate their different lines as a general system. A traction company whose business is confined to the construction of appliances for street railway companies, or to the operation of motors, cables, electrical or other appliances for the traction of the cars of such companies, has but little resemblance to a street railway company and more to a construction or power company. But when, as in this case, it operates a railway and leases the property and franchises of various railway companies and operates them on its own account, it is exercising the franchises of a street railway company, as it is authorized to do, and it enjoys the privileges granted to and becomes subject to the liabilities imposed by law upon such companies. This view is in harmony with all of our decisions touching the subject: Rafferty v. Central Traction Co., 147 Pa. 579; Reeves v. Phila. Traction Co., 152 Pa. 153; Old Colony Trust Co. v. Allentown, etc., Rapid Transit Co., 192 Pa. 596.

The judgment is affirmed.

Coatesville & Downingtown Street Railway Company, Appellant, *v.* West Chester Railway Company.

Equity Practice—Cause of action—Joint bill.

It is irregular practice in equity to join in a bill filed by several parties causes of action which are not the same, or which are not founded on any joint right.

Street railways—Extensions—Location—Exemplification—Acts of May 14, 1889, *P. L.* 211, *and June* 7, 1901, *P. L.* 514.

The filing by a street railway in the office of the secretary of the commonwealth of an exemplification of the record of the adoption of an extension, is a condition precedent to the construction of the extension.

Street railways — Location — Extensions — Rival companies — Acts of May 14, 1889, *and June* 7, 1901.

Where a street railway company incorporated subsequently to the act

of June 7, 1901, has promptly applied for the consent of the local authorities, it cannot be disturbed in the exclusive privilege of the highways named in its charter, for the period of two years allowed for construction; and it has a standing in equity to enjoin a company incorporated prior to the act of June 7, 1901, from building extensions on such streets during the running of the two years.

Not decided, whether the two years' period in which to procure municipal consent, allowed by the act of June 7, 1901, will be shortened or terminated by a positive act of refusal on the part of the municipality, or whether the full period may still be available for an opportunity to overcome objections.

Not decided, whether a street railway company may build a substantial portion of its route over a private right of way, not on any street or highway.

Argued Jan. 15, 1903. Appeal, No. 199, Jan. T., 1902, from decree of C. P., No. 5, Phila. Co., March T., 1902, No. 4342, dissolving injunction in case of Coatesville & Downingtown Street Railway Company, Coatesville and Western Street Railway Company and West Chester & Southern Street Railway Company v. West Chester Street Railway Company et al. Before MITCHELL, DEAN, FELL, MESTREZAT and POTTER, JJ. Reversed.

Bill in equity for an injunction. Before RALSTON, J.

The complainants averred that they were duly incorporated under the laws of the state of Pennsylvania, on the 10th and 12th days of June, 1901, under the acts of assembly pertaining to street railway companies, approved on May 14, 1889, and its supplement of June 7, 1901, and that one of the defendant companies, to wit: the West Chester Street Railway Company, was incorporated on August 4, 1890, under the same general street passenger railway act.

That on or about May 1, 1902, the said defendant pretended to adopt an alleged extension to its original route. That the said alleged extension was duly recorded in the office for the recording of deeds in and for the county of Chester, and that an exemplification of the said record was offered to the secretary of the commonwealth and was not accepted by that officer. That a large portion of the said alleged extension covers a portion of the routes of each one of the complainants and that the said alleged extension was not for the purpose of completing a

circuit upon its road or for the purpose of connecting its road with a portion of its own road or with the road of some other passenger railway, but is simply an extension or prolongation of its route, and was for many miles over private right of way without touching any highway, street or bridge, and that the said extension is a confiscation of the roads, franchises and properties of the complainants, without due process of law and is contrary to the provision of the constitution of the commonwealth of Pennsylvania and that the said adoption of the said alleged extension and the said building and construction is unlawful and not authorized by law and is against the statutory policy of the commonwealth and the provisions of the constitution and against public policy and any filing of any exemplification from the recorder of deeds is unlawful and that if the proposed construction, maintenance and operation over the routes set forth in the said extension be permitted, it would be a continuing trespass and an illegal annoyance to the irreparable injury of the complainants, from which they would have no adequate remedy at law.

The complainants prayed the court, under the provisions of the act of assembly approved June 19, 1871, entitled, "An act relating to legal proceedings by or against corporations," to declare the attempt of the said West Chester Street Railway Company to adopt, build and construct over the alleged extension illegal, against public policy and against the statutory laws of the commonwealth and the provisions of the constitution, and asked for a preliminary injunction restraining the said defendant from filing any exemplification in the office of the secretary of the commonwealth or from seeking any permission from local authorities to build and operate over said extension or from doing any work of any name or nature in connection with the said extension.

The court granted a preliminary injunction, which its subsequently dissolved.

Error assigned was decree dissolving the injunction.

John G. Johnson, with him *George Quintard Horwitz*, for appellant.—A company filing extensions has not the authority from the commonwealth to build until thirty days after these

extensions are filed: Homestead Street Railway Company v. Pittsburg, etc., Electric St. Ry. Co., 166 Pa. 162.

The alleged extension confiscates the routes already adopted by the appellants: Homestead Street Railway Company v. Pittsburg, etc., Electric Street Railway Company, 166 Pa. 162; Commonwealth v. Uwchlan Street Railway Company, 203 Pa. 608; Philadelphia, etc. Street Railway Company's Petition, 203 Pa. 355.

The extension of the West Chester Street Railway Company is over many miles of private right of way and the company has not only not secured the consent of local authorities, but has not secured the consent of the commonwealth: Rahn Township v. Tamaqua, etc., Street Railway Company, 167 Pa. 84; Penn. R. R. Co. v. Montgomery County Passenger Railway Co., 167 Pa. 62; Wheeler v. Penna. R. R. Co., 194 Pa. 539.

Thomas McConnell, Jr., with him *J. Henry Williams*, for appellees.—A street railway company which has not obtained municipal and property owners' consents, has no standing to file a bill in equity to restrain any other corporation from obtaining consents and building its road over territory claimed by the plaintiffs: Thomas v. Inter-County Street Railway Co., 167 Pa. 120; The Coatesville & Downingtown Street Railway Company v. Uwchlan Street Railway Company, 18 Pa. Superior Ct. 524.

Opinion by Mr. Justice Mitchell, May 11, 1903:

The causes of complaint set out in the bill in behalf of the parties complainant, though similar in tendency and result, do not appear to be the same, or founded on any joint right. They should regularly, therefore, have been put into separate bills. But as no objection was made in the court below, and the case has been argued here as if upon final hearing, we pass it by with this brief reference to avoid any inference that we have sanctioned it as correct practice.

The respondents have failed to show any right to build the branches complained of, at the time the bill was filed. The extension apparently was regularly adopted by the board of directors, was duly recorded at West Chester, and an exemplification of the record was offered for filing in the office of the

secretary of the commonwealth but was refused filing. The reasons of the commonwealth for this course do not appear, and it is stated in appellee's paper-book that the court of common pleas of Dauphin county has since issued a mandamus to the secretary commanding the filing of the exemplification. With this we have at present nothing to do. Section 4 of the Act of May 14, 1889, originally and as amended by the Act of June 7, 1901, P. L. 514, requires that the exemplification shall be filed, and expressly provides that "no right to actually construct the same shall vest until after thirty days from the filing of said exemplification." The filing was therefore a condition precedent, with which the defendants had not complied at the date of this bill, and the acts sought to be enjoined were without any legal authority. Under the act of June 19, 1871, this objection could be raised by any party whose rights are injured or invaded.

We come, therefore, to the question on which the court below apparently decided the case, and on which it has been mainly argued here, the standing of the complainants to invoke the assistance of a court of equity. In Larimer & Lincoln Street Railway Co. v. Larimer Street Railway Co., 137 Pa. 533, it was decided that as the municipal consent was under the constitution a condition precedent to the occupation of its streets, a street railway which had not obtained such consent had no standing to question the rights of another company on the streets. The court below held that that decision governs the present case. This depends on the construction of the act of June 7, 1901, amending the general street railway act of 1889.

By the act of 1889, which was the law under which the decision in Larimer & Lincoln Co. v. Larimer Co. was made, section 1, companies were authorized "for the purpose of constructing . . . . a street railway on any street or highway upon which no track is laid or authorized to be laid, or to be extended, under any existing charter." This it will be observed gave an exclusive privilege to the first company not only to tracks laid and in use, but to mere paper routes authorized but not built and perhaps not intended to be built but only adopted to close the streets to rival companies. This was a fraud on the public whose accommodation by the use of the line was the consideration for the grant of the franchise. By the amendment

to this section under the act of 1901, P. L. 514, companies were authorized to lay tracks on any street "upon which no track is laid under any existing charter, and in constant daily use for the transportation of passengers at the time of the application by another company for a charter to use such street." The omission of the words in the original act, "authorized to be laid" and the insertion of the words "and in constant daily use," etc, in the amended section, at once cut off the exclusive privileges of mere "authorized" or paper routes, and opened the streets not already actually occupied, to new companies as well as old.

This change of the law dealt primarily with existing companies. But it was foreseen that as to future charters difficulties would be likely to arise such as produced the case of Homestead Street Railway Co. v. Pittsburg, etc., Electric Street Railway Co., 166 Pa. 162, where a company with a later charter endeavored to cut under and supplant an older one authorized to use the same streets, by activity in being the first to secure the municipal consent. This court, in order to prevent the subversion of the intent of the statute, was obliged to hold that the first company had an implied right to a reasonable time (in that case about five weeks) in which to get consent, and having got it in that time it should prevail over a consent previous in time but given to a company with a later charter.

With a view to such difficulties the amended section one under the act of 1901, after the provision above quoted authorizing the use of streets on which no tracks were actually operated under existing charters, continued, "but whenever a charter after the approval of this act shall be granted to any corporation to build a road as provided by this act, no other charter to build a road on the same streets, highways, bridges or property shall be granted to any other company within the time during which, by the provisions of this act, the company first securing the charter has the right to commence and complete this work: Provided, That the consent of the local authorities shall be promptly applied for, and shall have been obtained within two years from the date of the charter."

This excepted future companies, under charters granted after the date of the act, from the danger of having their privileges taken away before they could get their tracks actually

laid, and restored during the period of two years allowed for building, the exclusive privileges on the streets named, that tracks "authorized to be laid" had under the original act. It was a fair and proper provision without which the necessary period required for building would have been but a vain and deceptive privilege, liable to be destroyed at any time without fault of the company, by the superior activity or wealth or influence of a junior rival. And for the same reason, the substantial protection of the franchise granted, and to prevent such interferences as were shown by Homestead Railway Co. v. Pittsburg, etc., Railway Co., supra, to be probable, the time for obtaining municipal consent was enlarged to the time allowed for building, and made an absolute right. Under this section if municipal consent has been promptly applied for, the want of it cannot be taken advantage of in any way to the prejudice of the company until the two years' limit has expired. To this extent the principle of Larimer & Lincoln Railway Co. v. Larimer Railway Co., supra, must be modified in its application to companies chartered since the act of 1901.

It is urged by appellee that the power to make extensions is given in a different section of the act (sec. 4, Act of 1901, P. L. 518) and is without limit other than that it shall not be used to cover streets on which tracks are already laid and in daily use. But this restriction is in the same terms as that in section one in regard to charters, and cannot have any wider application. The provision as to charters granted after the date of the act is separate and different as already discussed, and gives the companies under them two years in which to get their road built and tracks laid. During that time their franchise on the streets so authorized to be occupied, can no more be interfered with, by later charters or later extensions, than they could under the original act of 1889: Commonwealth ex rel. v. Uwchlan Street Railway Co., 203 Pa. 608.

This construction is apparently not in entire accord with the case of Coatesville, etc., Street Railway Co. v. Uwchlan Street Railway Co., 18 Pa. Superior Ct. 524. But in that case the applications for municipal consent were made at the same time, and that of the junior corporation only was granted. The court treated this as in effect a refusal of the other. Whether the two years' period in which to procure consent, allowed by the

act of 1901, will be shortened or terminated by a positive act of refusal on the part of the municipality, or whether the full period may still be available for an opportunity to overcome objections, is a question that does not arise in this case and therefore we express no opinion upon it.

Another question presented by appellant, whether a street railway may build a substantial portion of its route over a private right of way, not on any street or highway, we also leave for consideration when it shall necessarily arise. The present case does not call for a decision upon it.

The decree is reversed and an injunction is directed to be awarded, in accordance with the views expressed in this opinion.

May 20, 1903, it being made to appear that the opinion heretofore filed in this case was in part founded on misapprehension of an agreement between counsel, that said opinion is hereby modified by striking out the first paragraph thereof, and by adding at the end thereof the paragraph following:

This opinion is based on the status of the case as it appears in this court at this time, and is not to be taken as limiting the court below in the hearing on the merits, in regard to finding the facts as to the filing of the exemplification of the extension in the office of the secretary of the commonwealth, or as to the actual interference of defendant's routes with the routes of any of the complainant companies.

Alexander's Estate.

Will—Probate—Issue devisavit vel non—Undue influence.

In a will contest where the only question was undue influence, it appeared that the testator, who was ninety years old, but whose faculties were unimpaired, divided his estate equally between three sons and a daughter, charging against two of the sons who were the contestants, an indebtedness alleged by the contestants to be in great part due from one of them only. The third son who was a half-brother to the other children was in the habit of attending, under the testator's direction, to many of the testator's business affairs and had the custody of his books and papers other than the will. This son aided his father in stating an account against the contestants, and in the books the greater part of the debt was charged against one of the contestants only. A letter of the testator with which the third

son had nothing to do, indicated that testator entertained the idea that there were circumstances which made it proper to charge the debt against both of the contestants, and letters from the contestant not charged in the books, showed a recognition of the fact not only that the testator had entertained the idea of charging him in the will, but also that this idea was not irrational nor without some substantial basis. Testator's will was drawn by the testator's regular attorney, was executed before impartial witnesses in the absence of the third son, and remained in the possession of the attorney. *Held* that the evidence was insufficient to justify the granting of an issue to determine whether undue influence had been exercised upon the testator.

Where it is sought to set aside a will on the ground of mistake of a material fact by the testator, the test is not whether the fact was or might be established to the satisfaction of another person, but whether it was a clear mistake on the part of the testator which misled him, or was a conclusion of his own judgment though different from that which a court or jury might reach on the same information.

Argued Jan. 27, 1903. Appeal, No. 178, Jan. T., 1902, by Archibald A. Alexander, from decree of O. C. Phila. Co., Jan. T., 1896, No. 526, dismissing appeal from register of wills in estate of John Alexander, deceased. Before MITCHELL, DEAN, BROWN, MESTREZAT and POTTER, JJ. Affirmed.

Appeal from register of wills.

The facts appear by the adjudication of HANNA, P. J., which was in part as follows:

From the hundreds of pages of testimony, voluminous correspondence and numerous exhibits it is shown that testator as early as 1887 executed a last will and testament prepared by his professional adviser from instructions received from him. This was followed by another will executed in 1891, wherein he charged his two sons, contestants, with certain sums appearing in his ledger and identified by the pages thereof quoted in the will. No objection is made to its validity. Long prior to the date of this will testator entered into various business enterprises for the benefit of his sons, loaned and advanced them moneys, aided them in real estate investments and by loans and subscriptions to its capital stock, assisted them in the organization and establishment of a national bank at San Antonio, Texas, in which they were interested as stockholders and of which they became the president and cashier. At the request and solicitation of his sons, testator had numerous financial

transactions with the bank, consisting of loans and rediscount of notes discounted by the bank in the course of its business. For some years these financial transactions were profitable and satisfactory to the testator. But eventually he became exceedingly dissatisfied with the condition of affairs. The transactions with the bank caused him much solicitude and his account for loans and advances to his sons, particularly his eldest son, was so unsettled and unsecured as to render him anxious and persistent that the same should be closed and settled and the repayment of both the indebtedness of his sons and of the bank secured. The correspondence between testator and his sons in Texas was frequent and continuous in the year 1892. His constant requests for a settlement were met with as frequent promises. Visits were made to the father by the sons, and although settlement was always urged by him and as often acquiesced in by them, no promise was complied with, and no result approved by their father accomplished.

The dissatisfaction of testator increased, but his former urgent and almost pathetic requests became stern, parental demands. As he failed to procure from his sons a statement of their account and that of the bank with him he determined to prepare his own account from his books and the evidence of indebtedness in his possession. Testator was remarkably exact and methodical and his books with the entries all in his handwriting display his care, industry and accuracy to a wonderful degree. He made therein not only accounts with his children, but entries apparently of every investment and financial venture with which he had ever been connected or interested.

He accordingly requested his youngest son, who with his family and an older daughter of testator, composed the household, to prepare such an account. The account was accordingly carefully and laboriously prepared by testator's youngest son and with great minuteness included every item of charge testator claimed to be due him from his sons. This was in February, 1893, and resulted in a visit from testator's eldest son to his father.

The account which had been previously prepared was submitted to and carefully examined by him in connection with his youngest brother, and after many hours of scrutiny pronounced and marked by him correct so far as he was individually con-

cerned, with a single charge of interest excepted, and referring the items charged to his absent brother to him for approval.

But notwithstanding this the settlement which the testator so urgently required was again deferred; any payment of the indebtedness of his sons and of the bank remained unsecured.

The next fact appearing is that the testator consulted his counsel, who had prepared the will of 1891, and instructed him to prepare another will. Many of the provisions of the prior will were to be included therein. Testator's counsel, in pursuance of these instructions, accordingly prepared no less than three drafts, all of which were submitted to testator before the fourth or final draft met with his approval. And then the engrossed will was sent to testator by his counsel for execution. Testator carefully and minutely examined the will and was more critical and observant than his counsel: he discovered an error of the scrivener in a single word and declined to execute the will until it should be corrected. Those who attended as subscribing witnesses were consequently compelled to retire and the will was returned to counsel. Two days afterwards they again visited testator at his residence with the will corrected. A second time he carefully and leisurely examined the paper. It then met with his satisfaction, and in his own handwriting completed the blank for the names of the executors, signed his name, and declared the paper to be his last will in the presence of the three attending disinterested subscribing witnesses. This was on March 15, 1893. Testator's request to his sons for a settlement with him continued, but without avail. In the summer of 1893 the Texas bank failed and was forced into liquidation. Testator believed himself to be a creditor of the bank to a very large amount and so declared himself in what is called a "proof of claim." But to his surprise the receiver of the bank declined to recognize his claim for the full amount upon the ground that the books of the bank showed many of the transactions claimed by testator to be between himself and the bank were in reality between himself and his son, the president of the bank. The "proof of claim" was again prepared, but, meeting with the same objection a third time, was corrected so that the testator's claim against the bank was reduced from over $17,000, as he alleged, to $8,000, upon which he received a dividend of fifty per cent. Testator, wearied with his vain

endeavors to obtain security for the payment of the indebtedness of his son and the importunities of both his sons to obtain further loans, finally placed all his books and papers, including the account prepared by his youngest son, in the care and custody of his counsel and employed him to effect the settlement he personally was unable to obtain. The sons were represented by counsel, and after months of negotiation a supposed settlement was reached, but at the last moment repudiated. At this very time, by reason of certain financial difficulties involving testator's eldest son, he was induced to save him from arrest to agree to advance about $5,000 additional in order to avert the danger.

But testator's youngest son prevented any further depletion of his father's estate, and by his personal effort and assumption of liability effected a compromise and final settlement with his brothers' threatening and dangerous creditor. Still, testator was unsecured by his son for the payment of his indebtedness. And this led to the execution of the first codicil, dated June 27, 1894, fifteen months after the execution of the will.

This was also prepared by testator's counsel in pursuance of instructions received from him and executed in the presence of two of the subscribing witnesses to the will.

In this codicil testator recited that in the calculation of the sum of $115,100, which he referred to in his will and charged jointly against his two eldest sons, he omitted some amounts advanced by him prior to the date of his will, and accordingly directed they should be charged jointly with the sum of $121,800, with the same force and effect as if this amount had been written in the will. He further directed that interest be charged on said sum from the date of the codicil at the rate of four per cent per annum : and in all other respects confirmed and republished the will. And finally, on February 7, 1895, nearly eight months after the date of the first codicil and twenty days prior to his death, testator executed a second codicil, wherein he revoked a bequest in the third item of his will to his youngest son to be expended by him in furthering certain social and benevolent reforms.

Testator died February 27, 1895, at his residence in this city, having almost reached the age of ninety years. Within one week after his death a caveat was filed with the register by one

of his sons against the admission to probate of any last will and testament. On March 21, 1895, the will and codicils were offered for probate. This resulted in a protracted contest and hearing before the register, continuing until July 29, 1895, when the caveat was overruled, petition for an issue dismissed and the will and codicil admitted to probate.

Letters testamentary were thereupon granted to the executors. If their controversy is righteous and quarrel with their half-brother just, the delay of the contestant is inexplicable and unexplained. They waited until the time allowed for an appeal under the act of March 15, 1832, was within one month of expiration, and not until June 29, 1898, two years and eleven months after the decree of the register, admitting the will and codicils to probate was an appeal taken.

In the meanwhile the executors entered upon the performance of their duties, filed on December 13, 1895, an inventory and appraisement, and subsequently their first account, which was audited and an adjudication thereon filed by the court to January term, 1896, unexcepted to and unappealed from. It is true the contestants' right of appeal is reserved to them by the act of assembly, but their further laches and delay until October 8, 1898, before the presentation of their petition for a citation, etc., is somewhat additionally persuasive of a lack of faith in the propriety and justice of the controversy so long allowed to slumber.

The present contest is most remarkable and unique. While it is alleged in the petition originally filed that testator at the time of the execution of his will and codicils was not of sound disposing mind, memory or understanding or capable of making a valid will, and said writing was procured by the undue influence of his youngest son and prayed for issues to determine the testamentary capacity of testator and whether the will and codicils were procured to be executed by him by the undue influence of his youngest son, yet at the hearing before the court it was frankly admitted by counsel for the contestant that the testamentary capacity is conceded and no objection whatever made to the second codicil, executed February 7, 1895, as already stated, twenty days prior to the death of testator.

As also stated by counsel, it appears from the supplementary petition presented at the hearing the controversy is limited to

the questions whether a portion only of the fourth item of the will, the entire eighth or residuary clause of the will and the entire codicil of June 27, 1894, were procured to be inserted in the will and added thereto in the codicil by the undue influence of the youngest son of testator and half-brother to the contestants.

It was also conceded by counsel and could not otherwise be than admitted that testator possessed full power and authority in disposing of his estate to charge his sons with whatever amount he deemed proper by way of an advancement; in other words, convert debts into advancements. And it was also conceded to be the law, that the sons cannot be permitted to show that the amount so charged against them is incorrect in amount, or a mistaken calculation by testator.

So that it finally resulted in the inquiry whether through the malign and fraudulent influences exerted by the youngest son of testator over the mind of his father, the latter was induced to include in the fourth item of his will the portion embraced in the supplemental petition; and to execute the entire residuary clause wherein he not only bequeathed his residuary estate to his four children in equal shares and charged against the shares of his two oldest sons the sum of $115,100, but also in the first codicil with the increased amount of $121,800.

The contestants were the only witnesses examined in their behalf excepting the youngest son of testator, who was called by them as a witness under cross-examination and for many hours subjected to the most searching and rigorous examination. While on behalf of the executors and trustees, the proponents, was submitted the testimony of the counsel of testator, who had been for thirteen years his professional adviser, of a domestic servant in the employ of testator at the time of his death, of the youngest son of testator in his own behalf, and of the subscribing witnesses to the will and codicil.

Accordingly, confining the inquiry first to the will dated March 15, 1893, the material facts relative to its preparation have already been referred to. And it will suffice to say not a scintilla is shown that the youngest son was instrumental to its preparation or made any suggestion to his father relative to its provisions, other than he requested as a bequest some specific articles of furniture.

There is no evidence he requested his father to insert either the fourth item in his will, the residuary clause, nor the amount therein stated charged as an advancement to testator's sons, nor was he connected in the remotest degree with the preparation of either codicil.

And it has some significance that contestants are candid enough to admit the honesty and fair dealing of their half brother and concede he was not a conspirator with his father to defraud his brothers, nor a party to the execution of the second codicil revoking a bequest to him of $1,000 to be expended by him wholly in his discretion. The testimony further shows that the only connection he had with the ascertainment of the amount due testator from his two eldest sons is that at his father's request he laboriously prepared from his father's books and papers a statement of the account between him and his sons, and thus ascertained the sum total of their indebtedness. There is no evidence that testator's youngest son cajoled, instructed, demanded or solicited his father to insert any sum either in his will or codicil and influence him in any manner whatever to charge his two sons therewith. And the uncontradicted testimony of the testator's counsel, a gentleman of eminent ability and reputation, is that all his interviews respecting the execution of the will and codicil were with testator alone, that his son was never present, never gave him either instructions or suggestion, and the amount of the sons' indebtedness was communicated to him by his client, the testator.

Furthermore, the facts show the improbability, if not impossibility, that any one, much less either of his sons, was able to exercise any influence whatever upon the mind and intention of their father. He was a descendant of a sturdy, rugged and self-willed race. He was tenacious of what he deemed to be his right, determined and self-reliant. He was possessed of remarkable business ability, as shown by his books of account kept by himself and containing entries of his numerous financial transactions and investments made by him during a long series of years.

Testator lived to be almost ninety years old, was large of stature and vigorous in health until a few weeks prior to his death. He personally transacted his business affairs, aided to some extent by his youngest son, who resided with him. And

as illustrative of the mental and physical vigor of testator in the early winter of 1893, many months after the execution of his will, he journeyed to Pittsburg and there delivered an address entitled "History of the National Reform Movement," before the faculty and students of the Allegheny Theological Seminary, by whom it was afterwards printed for circulation.

Need it be said that a man possessing such mental characteristics and imperious force of will could not be easily influenced and induced to adopt a course other than he of his own volition had resolved upon and which he believed to be effective in accomplishing his clearly intended equitable distribution of his estate among his four children? In view of the admitted testamentary capacity of testator, which as defined by TRUNKEY, Justice, in Wilson v. Mitchell, 101 Pa. 495, "It is not so much what was the degree of memory possessed by the testator as this: Had he a disposing memory? Was he capable of recollecting the property he was about to bequeath; the manner of distributing it and the objects of his bounty? To sum up the whole in the most simple and intelligent form: Were his mind and memory sufficiently sound to enable him to know and to understand the business in which he was engaged at the time when he executed the will." Followed in the recent case of McGovran's Est., 185 Pa. 203, where the rule was applied by STEWART, P. J., and affirmed by the Supreme Court. It will require very strong and convincing evidence of undue influence to set aside the will of a testator prepared and executed under such circumstances and who is admittedly fully cognizant of the nature and character of his testamentary act.

And even although the will be executed with the knowledge and active assistance of a confidential friend and adviser, which relation to the testator it is contended was occupied by his youngest son, yet even there the burden of proof is upon the contestant to show undue influence as was held by this court in Estate of Mary Yorke, Deceased, affirmed by the Supreme Court in 185 Pa. 61.

And although it is said in Miller v. Miller, 187 Pa. 572, that it is not necessary that the confidential agent of the testator should have been his attorney "or that sustaining his filial relation he did not also hold an artificial one under the trust and confidence reposed in him by his father in business affairs,"

and from the facts in that case which was the trial of an issue d. v. n., it appeared the defense of the will rested on the theory, viz., "that the son was the trusted and confidential agent of his father," and for years had so faithfully performed his duty in that respect that it amply explained the favor shown towards him by his father, yet the will being so largely in his favor, the jury should have been instructed that a presumption of undue influence was raised and the burden was upon him to rebut this presumption. But that case is clearly to be distinguished from the present. As shown in the prior report in Miller's Estate, 179 Pa. 645, an appeal from the refusal of an issue, the testator not of extreme old age, was addicted to the inordinate use of intoxicating liquors, afflicted with locomotor ataxia and alleged to be of weakened intellect, the result of dissipation and disease. One of his sons lived in his father's house, "was his confident for years, his helper in his physical infirmity, his adviser in his business affairs," and the recipient by his father's will and codicils of three fourths of his large estate, besides being appointed one of the executors. Under the facts there proved it was clearly proper to award an issue to determine the question of undue influence and cast the onus of proof of its absence upon the son who claimed so large a share of the estate. And in reversing the court below and awarding the issue, DEAN, Justice, further said: "The condition of mind of a testator alleged to have been unduly influenced, although of testamentary capacity, is important in determining whether the act was the result of the fraudulent arts practiced upon him." How different all the facts in the present case. The allegations of testamentary incapacity abandoned and request for an issue upon that question withdrawn, both as to will and codicil. The testator, although of such advanced age, clear and vigorous in intellect, of abstemious habits, and of good physical health until a few weeks prior to his death. During all this time transacted his own business, aided but occasionally by his youngest son, who resided with his father, keeping his own books and conducting a continuous and almost daily correspondence with his sons, located in Texas, relative to his financial business relation with them and the bank with which they were connected. There being no evidence that the youngest son of testator was instrumental in the procurement of the ex-

ecution of either will or codicil and claimed no virtue in himself, nor that the bequest of the equal share of the residue was any reward for his faithfulness to his father's interest nor compensation for past services, and although under all the circumstances, not bound to rebut any presumption arising from his residence with his father and his occasional services in the management of his affairs, yet in view of the aspersions cast upon his good name and reputation the youngest son of testator eagerly availed himself of every opportunity to rebut the slightest presumption of wrong and suspicion of unfair dealing towards his brothers. From his uncontradicted testimony it appeared that the account of their indebtedness was prepared by him at the request of his father. That he was not connected with the preparation of the will or codicil in the remotest degree and was not present at their examination by testator nor at their execution. In this he is fully corroborated by the counsel of the testator and the subscribing witnesses. The contestants failed to produce the slightest proof of any request or solicitation on the part of the youngest son of testator or that he exerted any influence whatever upon the mind or intention of his father in the preparation of either will or codicil. To sum up the whole matter, it is simply this, that testator concluded his two eldest sons had already been advanced individually or for their benefit a large proportion of his estate, and, in order to work out an equitable distribution of his property and protect the children not indebted to him, they should be charged jointly with the amount loaned and advanced to them, together with a debt of the Texas National Bank, of which they were the officers. He accordingly so directed, clearly and unmistakably, as he had the undisputed right so to do.

The auditing judge found that the appeal should be dismissed.

Exceptions to the adjudication were dismissed by the court in banc, in an opinion by PENROSE, J., largely quoted in the opinion of the Supreme Court.

Error assigned was the decree of the court.

Joseph deF. Junkin and *M. Hampton Todd*, for appellant.

George Wharton Pepper and *John G. Johnson* for the Fidelity

Trust Company and *Lucien H. Alexander* in propria persona, were not heard.

PER CURIAM, May 11, 1903:

That the making of the will was the testator's own act was convincingly shown by the preparatory drafts and consultations with his counsel. The directions were his own, and were clearly imparted by himself to counsel who embodied them in his will. The alleged undue influence therefore must have antedated the making of the will, and have been powerful enough to operate in the absence of the influencing party or parties. This is rendered highly improbable by the universal and undisputed testimony as to the strong and masterful personality of the testator, and the court have found that there is not a scintilla of evidence to sustain the allegation.

The only other point on which anything need be said is the testator's charge in the will and codicil of a large sum as an advancement against the contestant and another son. The learned counsel for the appellants are too well versed in the law to question the right of a father to dispose of his estate even as against his children in such manner as he chooses, but they rest their case on the ground that the provision as to said advancement was made under a mistake of fact, sufficiently material and sufficiently shown by the testator's assigned reasons, to require the setting aside of this part of his will. The crucial question however is not whether the alleged fact was or might be actually established to the satisfaction of another person or tribunal, but whether it was a clear mistake on the part of testator which misled him, or was a conclusion reached by his own judgment though different from that which the court or a jury might reach on the same information. If the latter it cannot be assailed however unreasonable it may seem. The testator was entitled to form his own judgment and to act upon it without regard to whether it agreed with that of others or not. The evidence shows that the direction as to the charge of the advancement against both his sons was the result of the testator's deliberate judgment and intention. On this point we adopt the language of the court below: "It is true that in his family book the debt which the will directs shall be charged jointly against two of his sons, is charged against one of them

only; but that he entertained the idea that there were circumstances which made it proper to charge it, ultimately, against both, is clearly indicated by his letter to them of December 30, 1892. The suggestion that this letter emanated from another son, the half-brother of the two thus jointly charged by the will, is absolutely without support by the evidence. It was copied, at the instance of the testator, by the sister of the older brothers, the copy being sent, and the original, in his handwriting, retained; while the letters of January 13 and January 18, 1893, from the son not charged in the book, expressing his willingness that 'anything that may be coming' to him may be 'pledged as security for any advance' to the other brother, 'in Arizona or Texas,' or for any of his personal or the bank's indebtedness, are a clear recognition of the fact not only that the idea was entertained, but that it was not irrational or without some substantial basis."

Decree affirmed at the costs of appellants.

Hanbest *v.* Grayson.

Will—Power of sale—Condition—Landlord and tenant.

A will after reciting that testatrix had rented certain real estate for three years, directed her executor "in case of my (her) death before the expiration of said lease," to collect the rents etc., and then further directed him to give "the tenant three months' notice before the expiration of his present term, and at said time, and upon the vacation of said property by the said tenant, I authorize my said executor to sell the said property," etc. In the next clause she expressed the desire that her "estate may be settled and divided as soon as conveniently and legally may be after sale has been made of my said property." And in the last clause she appointed an executor, and provided "if I should live beyond the time that I have set for my executor to take charge of the above named property I authorize my executor with full power to carry out the above items and bequests at my decease." After the death of testatrix the executors sold the property to the tenant without having given three months' notice. After the sale the legatees elected to take the property as land. A sale was necessary for the payment of legacies. *Held*, (1) that the termination of the tenants' possession was not a condition precedent to the power of sale; (2) that the executor had a right to sell to the tenant without giving three months' notice; (3) that the election of the legatees to take the property as land was too late, and also ineffectual by reason of the necessity of providing for the payment of legacies.

Argued Jan. 28, 1903. Appeal, No. 227, Jan. T., 1902, by plaintiffs, from decree of C. P., No. 4, Phila. Co., Dec. T., 1901, No. 2746, on bill and cross bill in case of John DeHaven Hanbest, Hannah A. Hanbest, Naomi J. McCurdy, Anthony A. Hirst, Executor of Catherine Hayes, Deceased, and Emily Farrell v. George Grayson, Executor of Julia Ann Hanbest, Deceased, and John Kane. Before MITCHELL, DEAN, BROWN, MESTREZAT and POTTER, JJ. Affirmed.

Bill in equity and cross bill.

The case was heard on bill and answer and cross bill and answer.

The substance of the pleadings are stated by WILLSON, J., as follows:

The controversy turns upon the proper construction to be given to the will of Julia A. Hanbest, who died on December 30, 1900. The will, which was dated November 28, 1900, after reciting that she was the owner of property known as the Blue Bell Hotel, situated on Woodland avenue, in the twenty-seventh ward of this city, contained the following language: "The hotel I have rented to one John Kane for the term of three years, commencing June 1st, 1897, for seventy-five dollars a month, payable in advance, it is my desire that my executor hereinafter named, in case of my death before the expiration of said lease, shall collect the rents of said property as they become due, and, after paying all taxes and legitimate charges upon said premises, to divide quarterly the net income of said rent equally between John DeHaven Hanbest, Hannah A. Hanbest, Naomi J. McCurdy, Catherine Hayes, and Emily Farrell; I likewise direct my said executor to give my said tenant three months' notice before the expiration of his present term, and at said time and upon the vacation of said property by the said Kane, I authorize my said executor to sell the said property, including said adjoining premises, which rents now for eight dollars a month, either at public or private sale, for the best and highest price that can be obtained for the same, giving him full discretion in this behalf: and upon such sale he shall make good and sufficient deed of conveyance therefor that shall vest the title in the purchaser or purchasers thereof in fee simple."

The said Catherine Hayes died on February 23, 1901, and the executor of her will, Anthony A. Hirst, represents her interest in this proceeding. One of the defendants in the original bill, George Grayson, was the executor appointed by Julia A. Hanbest in her will, which was duly proved. Without giving any notice to the tenant, John Kane, before the expiration of his lease, and while the said Kane was still in occupation of the premises as tenant, on December 12, 1901, the said Grayson, executor, entered into articles of agreement with the said John Kane, for the sale of a certain portion of the real estate which he was authorized to sell by the provisions of the Hanbest will, including the said Blue Bell Hotel, for the sum of $28,000. The plaintiffs in the original bill allege that the proposed sale to John Kane, contemplated and provided for by the said articles of agreement, was such a sale as the executor had no authority to make. It is contended by these plaintiffs that the provisions in the Hanbest will that the executor should give Kane, the tenant, three months' notice before the expiration of his then present term, and that upon the vacation of the property by said Kane, the executor might sell the same, constituted a condition precedent to the executor having any lawful authority to sell the property. It is also claimed that John Kane, by being allowed to remain in possession of the property, was given an unfair advantage over other persons who might have desired to purchase the property, and that thereby he was enabled to purchase it at a low and inadequate price; and further, that Grayson, the executor, by selling a portion of the property divided from the rest by the middle line of Seventy-third street, has seriously impaired the value and marketability of that portion of the property which was not sold to Kane. For the reasons stated the plaintiffs ask that Grayson, the executor before stated, may be restrained from selling said property to John Kane, and that John Kane may be required to deliver up for cancelation the articles of agreement before referred to.

The cross bill filed by Kane against the plaintiffs in the original bill, and also against Grayson, the executor sets out the articles of agreement with Grayson, alleges that the agreement was executed by Grayson, with full authority to make the same; that the defendants in the cross bill, who were the

plaintiffs in the original bill, had filed the said original bill, and, also, that on or about December 18, 1901, the said plaintiffs in the original bill had executed a certain deed poll or writing undertaking to elect to take the said real estate in kind, without conversion, and had caused said writing to be filed in the office of the clerk of the orphans' court of this county. It is also averred by the said plaintiff, John Kane, that the filing of the said deed poll constituted a cloud upon the title to the property. He therefore asks that, upon payment of the balance due under the terms of his articles of agreement entered into with the said executor, George Grayson, the said executor be directed to make proper conveyance of the property to him, the said John Kane, and that the defendants in the cross bill, who were the plaintiffs in the original bill, be restrained from asserting any right to take the said premises which the said Grayson, executor, had agreed to sell to him, John Kane, and from interfering in any way with the said executor in the sale and conveyance of the said premises.

The court entered a decree in favor of the defendants in the bill and the plaintiff, Kane, in the cross bill.

Error assigned was the decree of the court.

Henry J. Scott with him *Anthony A. Hirst*, for appellants.

Edwin O. Michener, with him *Preston K. Erdman*, for appellee.

Opinion by Mr. Justice Mitchell, May 11, 1903:

The will of testatrix after reciting that she had rented the property in question for three years, directed her executor "in case of my (her) death before the expiration of said lease" to collect the rents, etc., and then further directed him to give "the tenant three months' notice before the expiration of his present term, and at said time, and upon the vacation of said property by the said Kane, I authorize my said executor to sell the said property," etc.

In the next clause she expresses the desire that her "estate may be settled and divided as soon as conveniently and legally may be after sale has been made of my said property." And in the last clause she appoints an executor, and provides "if I

should live beyond the time that I have set for my executor to take charge of the above named property I authorize my executor with full power to carry out the above items and bequests at my decease."

Under these provisions the intention of the testatrix is not really open to serious doubt. She desired her estate settled up and divided as soon after her death as it "conveniently and legally" could be done, and for settlement the sale of the property in question was necessary. She knew that the tenant could not be deprived of his possession under his lease, and therefore she directed her executor to collect the rents till the end of his term, but to give notice so that he should vacate possession at that time. She apparently did not desire to sell the property during her own life but that the executor should sell as soon as might be thereafter. In furtherance of this desire she added the clause as to what the executor should do if she should live beyond the time she had set for him to take charge of the property, i. e., beyond the end of the tenant's then present term. In that event he was "to carry out the above items and bequests at my (her) decease" that is, if the tenant was in possession under a new term the executor should collect the rents, etc., and give the necessary notice to regain possession at the end. In all this there was nothing more than the recognition of the tenant's rights, and the direction to her executor to terminate them in the legal and orderly way so that the sale could be made promptly. The termination of the tenant's possession was not a condition precedent or otherwise to the power of sale, but simply the removal of an obstacle which she supposed to stand in the way. As said by the learned judge below "there was no provision in the will prohibiting a sale being made to Kane. There was nothing to indicate that, if the lease had been terminated by agreement, or in any other way, previous to the expiration of the year, the sale should not be made to Kane."

The election of the appellants to take the property as land was not made until Kane's rights had been fixed by the contract of sale. It was therefore too late even if not otherwise ineffectual by the necessity of providing for the payment of legacies, etc.

Decree affirmed at costs of appellants.

Mansfield's Estate.

Guardian and ward—Trusts and trustees—Removal of guardian—Removal of trustee.

A testamentary trustee who was also guardian of testator's minor child, will be removed where it appears that he lost three years' rent of premises through imprudent indulgence of tenants; that he resisted a suit by which the sum of $1,413 was found to be in his hands, belonging to the estate of a sister of the minor, in which the minor had an ultimate interest; that he made no attempt to invest the sum of $1,175 belonging to his ward, but with which he had erroneously debited himself in his account as trustee; and that after having been ordered by the court to transfer this amount to his account as guardian he denied before the examiner that he was accountable in that capacity.

Argued Jan. 29, 1903. Appeal, by Job R. Mansfield, from decrees of O. C. Phila. Co., April T., 1894, No. 451, dismissing trustee and guardian in estate of Charles C. Mansfield, deceased. Before MITCHELL, DEAN, BROWN, MESTREZAT and POTTER, JJ. Affirmed.

Petitions for removal of trustee and guardian. Before ASHMAN, J.

From the record it appeared that Job R. Mansfield was surviving trustee and testamentary guardian under the will of Charles C. Mansfield. The minor, Edith Mansfield, filed two petitions, one praying the removal of the respondent as trustee, and the other his removal as guardian.

The opinion on the first petition was as follows:

Without going into any elaborate review of the testimony, or into any criticism of motives, it is quite clear that the respondent has mismanaged the minor's estate. He was surcharged, by the auditing judge, whose decision was affirmed by the Supreme Court, with three years' rent of premises which had been lost through imprudent indulgence to the tenants; he resisted a suit by which the sum of $1,413 was found to be in his hands, belonging to the estate of a sister of the minor, in which the minor had an ultimate interest, and he made no attempt to invest the sum of $1,175, belonging to his ward, but with which he had erroneously debited himself in his account

as trustee. After having been ordered by the court to transfer the amount to his account as guardian, he denied before the examiner that he was accountable in that capacity. He used his position as trustee in prejudice of the interests committed to him as guardian and thereby subjected the estate of the ward to risks which will be avoided by his discharge. The petition is granted.

The opinion on the second petition was as follows:

The same reasons which have led to the discharge of the respondent as guardian must prevail in this proceeding for his dismissal as trustee. His management of the trust property has been adverse to the interests of the minor, under his care, as her guardian, and a feeling of hostility has been engendered in the minds of the cestui que trust which, if continued, may prove embarrassing and injurious to all parties. The petition is granted.

Errors assigned were the decrees of the court.

Wm. H. R. Lukens, for appellant.—Common skill, common prudence and common caution are all that courts require from trustees: Woodward's Estate, 27 W. N. C. 407; King v. Morrisson, 1 P. & W. 188; Barker's Estate, 159 Pa. 518; Williams's App. 73 Pa., 249; Neafie's App., 199 Pa. 307.

John Weaver, for appellee.

Per Curiam, May 11, 1903:

Decree affirmed on the opinion of the court below.

Williamsport, Appellant, *v.* Williamsport Passenger Railway Company

Street railways—Special charter—Duty to repave streets—Act of April 15, 1863, *P. L.* (1864) 1080.

Where a street railway is incorporated under a special charter which provides "said company, in constructing said road, shall conform to the grades now used, or hereafter to be by law used, of the several streets, roads and avenues traversed by said road, and keep the same in good

repair, at the proper expense of said company," and it has kept the portion of the streets occupied by its railway in good repair, it cannot be required to pay for repaving them with a new and different kind of pavement adopted by a city whose streets it traverses.

Argued March 19, 1903. Appeal, No. 52, Jan. T., 1903, by plaintiff, from judgment of C. P. Lycoming Co., March T., 1901, No. 149, on verdict for defendant in case of City of Williamsport v. Williamsport Passenger Railway Company. Before MITCHELL, DEAN, FELL, BROWN and POTTER, JJ. Affirmed.

Assumpsit to recover from the defendant the cost of paving between its tracks with asphalt and vitrified brick. Before HART, P. J., without a jury.

The facts appear by the opinion of the Supreme Court.

Verdict and judgment for the defendant. Plaintiff appealed.

Error assigned among others was in entering judgment for the defendant.

John J. Reardon, with him *F. P. Cummings*, city solicitor, for appellant, cited: Phila. v. Thirteenth and Fifteenth Street, Passenger Ry. Co., 169 Pa. 269; Phila. v. Ridge Avenue Passenger Ry. Co., 143 Pa. 444; Reading v. United Traction Co., 202 Pa. 571.

C. LaRue Munson, with him *Seth T. McCormick* and *Addison Candor*, for appellee, cited: Norristown v. Norristown Passenger Ry. Co., 148 Pa. 87; Chicago v. Sheldon, 76 U. S. 50; Western Paving, etc., Co. v. Citizens' Ry. Co., 128 Ind. 525 (26 N. E. Repr. 188); Gilmore v. Utica, 121 N. Y. 561 (24 N. E. Repr. 1009); State v. Corrigan Ry. Co., 85 Mo. 263; Blount v. Janesville, 31 Wis. 648; Leek Imp. Commrs. v. Justices of Stafford, L. R. 20 Q. B. Div. 794; City of Phila. v. Hestonville, etc., R. R. Co., 177 Pa. 371; Williamsport v. Williamsport Passenger Ry. Co., 203 Pa. 1.

OPINION BY MR. JUSTICE BROWN, May 4, 1903:

The Williamsport Passenger Railway Company was incorporated by Act of April 15, 1863, P. L. (1864) 1080. It was

authorized to construct a railway in the borough of Williamsport, now the city of Williamsport, and to lay its tracks on the streets of the borough. At that time there was no general act relating to the incorporation of street railways, and the powers, privileges, duties and obligations of each particular company were defined in the act creating it. The right of this company to use the streets of the town was absolute and depended upon no municipal consent. The only conditions annexed to the power given it to occupy the streets were "that no freight or burden trains, or locomotives, shall be permitted to pass over the same," and "that said company, in constructing said road, shall conform to the grades now used, or hereafter to be by law used, of the several streets, roads and avenues traversed by said road, and keep the same in good repair, at the proper expense of said company."

In the construction of its railway the appellee occupied, among other streets, East Third, West Fourth and Basin. Until the present controversy arose between the railway company and the city of Williamsport, East Third street, from the curb line to the railroad tracks, was paved with what is known as Telford macadam, and the appellee had the same kind of pavement between its tracks. West Fourth street was paved with a wooden block pavement, except the space between the tracks of the railway company, which was paved with mountain stone, laid on a broken stone foundation; and Basin street had not been paved at all, except between the tracks of the railway company, where, as on West Fourth street, it was paved with mountain stone, laid on a broken stone foundation.

In the summer of 1900 the city of Williamsport repaved East Third street from the curb line to the railway tracks with the best quality of vitrified brick, laid on a hydraulic cement foundation, and notified the defendant to put in suitable order that part of the street occupied by the railway, and that the engineering department of the city would, upon application, furnish it with the proper grade. This grade was furnished by the city. In order to adjust its tracks to the grade, the macadam pavement between the tracks was removed by the defendant company, the tracks were brought to grade, and the company then proceeded to relay the space between its tracks with a good quality of macadam, which, when completed, as shown by the

city's own evidence, would have been done "as well as that kind of work could be done." When the company had completed a portion of the repaving between its tracks with macadam, in the manner just stated, the city gave notice to it to stop repaving in that manner, removed the macadam which it had placed between the tracks and replaced the same with vitrified bricks on a concrete foundation, in conformity to the pavement from curb to curb. During the same summer the city paved Basin street with virtified brick and repaved West Fourth street with sheet asphaltum, laid on a concrete foundation. What occurred between the city and the railway company on East Third street was substantially what took place as to these two other streets; and, after the city has repaved the space between the tracks on the three streets named, this suit was brought against the railway company to recover the cost of doing so.

The appellee raises no question as to its duty, made known to it by the express words of its charter, to keep "in good repair" those portions of the streets occupied by its railroad: but it does insist that, as its declared duty is only to keep them in "good repair," it cannot be required to repave them with a new and different kind of pavement adopted by the city. The streets of the city are occupied by the railway company, not with its consent, but without it. The legislature, which was supreme in its authority over the streets of the borough of Williamsport, gave to this passenger railway company the right to occupy them. In the grant of that right, and nowhere else, must be found what conditions, if any, are imposed upon it. No power was delegated to the municipality to make conditions, but the legislature, reserving that power to itself, imposed, as the only conditions, those already stated; and the duty of the railway company is, therefore, manifestly only to keep "in good repair" those portions of the streets occupied by its tracks.

There is no finding that the appellee had failed to keep the space between its tracks in good repair. On the contrary, the findings are, that on East Third street the space between the tracks had been paved with Telford macadam paving, and that the railway company was about to repave between its tracks and to make a paving therein "with macadam of good condition, and as well as it could be done and equal to the pavement which had been previously laid on that portion of the street,"

when it was prevented from completing said repairs by the police force of the city of Williamsport, acting under the direction of the mayor; that there was no evidence in the case that the portion of the street between the tracks on Basin street was out of repair, or not in suitable condition; that there had been a pavement on West Fourth street, between the tracks of the defendant, and that it was in better condition than the remainder of the street, and that, when the railway company was about to repair the said space between the tracks by replacing the kind of pavement thereon in a good and substantial condition, it was prevented from doing so by the police force of the city of Williamsport, under the direction of its mayor.

The city, however, was not satisfied that the space between the tracks, as maintained up to the year 1900, should be kept "in good repair" by the railway company, but, when it determined to pave one of the streets and repave the other two, it assumed the right to shift from itself to the appellee the burden of paving and repaving those portions of the streets occupied by the railway. As the borough of Williamsport had no right, when the railway company first went upon its streets, to confront it with any conditions, the city of Williamsport, its successor, has no right to do so now by imposing any burden upon it. The city's sole right is to ask that the railway company be compelled to perform the duty which the legislature said should rest upon it. Under the findings of the learned court, it has not failed to perform that duty. The measure of its duty, as read in the act, is to keep its portion of the streets "in good repair;" the measure that the appellant would mete out to it is not only to repair, but to repave, by substituting for an old pavement that had been kept in good repair a new one, adopted by the city. By this latter measure, the duty of the appellee is not to be gauged, and the judgment of the court below was rightly that it had not been in default. Its duty to repair is a continuing one and hereafter will be to keep in repair the new pavement laid by the city.

There is nothing in the charter of the railway company requiring it to put the streets in repair; the duty is simply to keep in repair. In Williamsport, to use, etc., v. Williamsport Pass. Ry. Co., 203 Pa. 1, the judgment of the court below was affirmed on the opinion refusing a new trial, in which it

was very properly said: "It must be borne in mind that, under the charter of the defendant, it is not liable for paving or repaving streets occupied by its tracks or any portion of them, but only for keeping the streets in repair."

Philadelphia v. Ridge Ave. Pass. Ry. Co., 143 Pa. 444, and Philadelphia v. Thirteenth and Fifteenth Streets Ry. Co., 169 Pa. 269, are cited in support of the contention of the appellant that the appellee's duty to repair includes the duty to replace an old pavement with a new and improved one; but, of these two cases, we said, in Philadelphia v. Hestonville, etc., R. R. Co., 177 Pa. 371: "In neither of these cases was the question involved. In the latter case the company was subject to the ordinance of 1857 which expressly required it 'to be at the cost and expense of maintaining, paving and repairing,' the streets occupied by it. The same is true of the former, or Ridge Ave. case. The Girard College Pass. Ry. Co. was by the act of April 15, 1858, made subject to the ordinance of 1857. It was merged into the Ridge Ave. Co. and this provision became a part of the law of the consolidated company, and was held to be binding upon it. The question was presented in Norristown v. Norristown Pass. Ry. Co., 148 Pa. 87, and decided in favor of the position of the appellant, by the affirmance of the judgment appealed from, in a short per curiam." In Reading v. United Traction Company, 202 Pa. 571, another case upon which the appellant seems to place great reliance, the street railway company had placed its tracks upon streets of a city with the municipal consent, and on condition that it pave its right of way and keep the same in good repair, or that it pave the said right of way in a specified manner superior to the then construction of the streets, and keep the said paving in good repair.

The question raised on this appeal was settled in favor of the appellee in Philadelphia v. Hestonville, etc., R. R. Co., supra, and further discussion of it is not now needed.

Judgment affirmed.

Bainbridge, Appellant, *v.* Union Traction Company.

Negligence—Street railway companies—Passenger on running board of car—Sudden jerk.

Where a passenger on an open summer electric street car, when it is approaching a crossing where he intends to get off, of his own motion leaves his seat and steps down on the running board of the car, holding the rail with his left hand and having in his right a bag containing tools, and while in this position the car stops, with a sudden and violent jerk, and he is thrown off and injured, his contributory negligence is a bar to the recovery of damages.

Where a passenger on an electric street car leaves his seat where he is safe, and steps down on the running board of the car, and remains there while it is in motion, he voluntarily puts himself in a place of danger and takes upon himself the risk of his position from any cause.

Argued March 25, 1903. Appeal, No. 37, Jan. T., 1903, by plaintiff, from order of C. P. No. 5, Phila. Co., Sept. T., 1901, No. 1225, refusing to take off nonsuit, in case of Henry Bainbridge v. Union Traction Company. Before MITCHELL, FELL, BROWN, MESTREZAT and POTTER, JJ. Affirmed.

Trespass to recover damages for personal injuries sustained on an electric street car. Before RALSTON, J.

The court entered a judgment of compulsory nonsuit which it subsequently refused to take off. Plaintiff appealed.

Error assigned was in refusing to take off the nonsuit.

I. Hazleton Mirkil, with him *Horace M. Rumsey*, for appellant, cited: Powelson v. United Traction Co., 204 Pa. 474; Sweeney v. Union Traction Co., 199 Pa. 293; Raughley v. West Jersey, etc., R. R. Co., 202 Pa. 43; Holmes v. Traction Co., 153 Pa. 152; Bensing v. Railway Co., 9 Pa. Superior Ct. 142; Linch v. Traction Co., 153 Pa. 102; Smith v. Transit Co., 167 Pa. 209.

Thomas Leaming, with him *Charles Biddle*, for appellee, cited: Woodroffe v. Roxborough, etc., Ry. Co., 201 Pa. 521; Thane v. Scranton Traction Co., 191 Pa. 249.

OPINION BY MR. JUSTICE BROWN, May 4, 1903:

The plaintiff below got on a car of the defendant company

at Twelfth and Walnut streets, in the city of Philadelphia, and took a seat about the middle of it. When it was approaching Sixty-third street, of his own motion he left his seat and stepped down on the running board, holding the rail with his left hand and having in his right a bag containing tools. While in this position he says the car stopped with a sudden and violent jerk on the west side of Sixty-third street, and he was thrown off, sustaining the injuries for which he is seeking compensation.

When the appellant left his seat, where he was safe, and stepped down on the running board of the car, and remained there while it was in motion, he voluntarily put himself in a place of danger and took upon himself the risk of his position from any cause: Thane v. Scranton Traction Company, 191 Pa. 249; Bumbear v. United Traction Company, 198 Pa. 198; Woodroffe v. Roxborough, etc., Railway Company, 201 Pa. 521. With one hand grasping the rail and another holding on to the bag of tools, the risk which he took of being thrown from the car while so standing on the running board by its sudden stopping was most imminent, and for his negligence in the assumption of such a risk he alone must bear the consequences.

That the appellant stepped down on the running board of the moving car, because he intended to get off at Sixty-third street, in no manner excuses his negligence. The speed of the car was slackening as it approached Sixty-third street; he knew it would stop; he had signaled the conductor to have it stopped, and his signal was heeded; but, instead of waiting for it to stop, he started to get off while it was in motion by stepping down on the running board. The judgment of the court below is sustained by Hunterson v. Union Traction Company, this day decided, in which we have reaffirmed the rule as laid down in Powelson v. United Traction Company, 204 Pa. 474, that to step on or off a moving car, whether the power which propels the car be steam or electricity, is per se negligence, and, if injury results to the passenger, he cannot recover damages.

In view of the negligence of the plaintiff, it is immaterial whether there was any evidence of the negligence of the defendant.

Judgment affirmed.

Philadelphia to use, Appellant, *v.* Pemberton.

Appeals—Practice—Supreme Court—Interlocutory order—Scire facias sur municipal claim—Act of June 4, 1901, *P. L.* 364.

Where in a proceeding on a scire facias sur municipal claim under the Act of June 4, 1901, P. L. 364, an affidavit of defense is filed and the plaintiff files a replication to it, in pursuance of a rule, and the defendant then moves for judgment on the whole record, which motion the court dismisses, the order dismissing the motion is interlocutory and no appeal lies from it.

Argued March 25, 1903. Appeal, No. 28, Jan. T., 1903, by defendant, from order of C. P. No. 1, Phila. Co., M. L. D. No. 811, dismissing motion for judgment, in case of City of Philadelphia to use of Vulcanite Paving Company v. Clifford Pemberton, Jr., and Frank Mauran. Before MITCHELL, FELL, BROWN, MESTREZAT and POTTER, JJ. Appeal quashed.

Motion to quash appeal.

M. Hampton Todd, with him *E. O. Michener* and *John G. Johnson*, for the motion.—The order of the court was interlocutory and no appeal lies: Carter v. Caldwell, 147 Pa. 370; Keemer v. Herr, 12 W. N. C. 90; Phila. v. Christman, 6 Pa. Superior Ct. 29.

Thomas Ridgway, with him *John J. Ridgway*, contra.

OPINION BY MR. JUSTICE BROWN, May 4, 1903:

This is a scire facias under the Act of June 4, 1901, P. L. 364, to enforce payment of a municipal claim. To it an affidavit of defense was filed. The nineteenth section of the act provides: "If an affidavit of defense be filed, a rule may be taken for judgment for want of a sufficient affidavit of defense, or for so much of the claim as is insufficiently denied, with leave to proceed for the residue. The defendant may, by rule, require the plaintiff to reply, under oath or affirmation, to the statements set forth in the affidavit of defense, and after the replication has been filed may move for judgment on the whole record." In pursuance of a rule taken, the plaintiff filed a replication to the affidavit of defense, and the defendants then

moved for judgment on the whole record. This motion was dismissed by the court, and the present appeal taken, the errors assigned being the dismissal of the defendants' motion for judgment and the failure to enter judgment for them on the whole record.

There was no final judgment in the court below, and this appeal must be quashed. The appellants ask us to dismiss the motion to quash, because, by the fortieth section of the act, an appeal lies "from any definitive judgment, order or decree, entered by the court of common pleas under any of the provisions" of the act. In different sections of the act the courts of common pleas are authorized to enter definitive judgments, orders or decrees, and from them an appeal lies under the section quoted. In this case the court withheld its judgment. It did nothing. It entered no judgment, nor did it make an order or decree that could be enforced against either of the parties to the proceeding. After the motion was dismissed the record stood just as it was before the motion was made. With a replication filed to an affidavit of defense, a defendant may move for judgment on the whole record, and if, from an inspection of the same, it is clear what the judgment ought to be, the court may enter it; but, even in such a case, there is no requirement in the act that it must be entered. Whether in this case it is evident what the judgment of the court below should have been on the whole record, or whether any could have been entered on the same, we do not decide, for we have not examined the record. We pass now only on the motion to quash the appeal. The order of the court dismissing the motion for judgment settled nothing at all finally, but was purely intermediate, from which there is no appeal, in the absence of a statutory provision giving it.

Appeal quashed.

Conshohocken Borough v. Conshohocken Railway Company.

Street railways—Lease—Municipal consent—Traction company.

Where a street railway company which has municipal consent to the use of streets, leases its road to a traction company, the latter company succeeds to the right of the street railway company to the use of the streets

Street railways—Municipal consent—Condition—Guard wires.

Where a borough in granting to a street railway company the right to use streets, requires the company to use guard wires over the trolley wire, and the borough delays for a long time to enforce this condition, and then files a bill to restrain the operation of cars, but the real purpose of the bill is not to compel the erection of guard wires, the court will dismiss the bill, if within a reasonable time the company puts up the wires.

Argued Feb. 2, 1903. Appeal, No. 264, Jan. T., 1902, by plaintiff, from decree of C. P. Montgomery Co., Oct. T., 1901, No. 3, dismissing bill in equity in case of Conshohocken Borough v. Conshohocken Railway Company, the Schuylkill Valley Traction Company, and the Roxborough, Chestnut Hill and Norristown Railway Company. Before MITCHELL, DEAN, BROWN, MESTREZAT and POTTER, JJ. Affirmed.

Bill in equity for an injunction. Before SWARTZ, P. J.

The route of the defendant companies can best be understood by the plan on the following page.

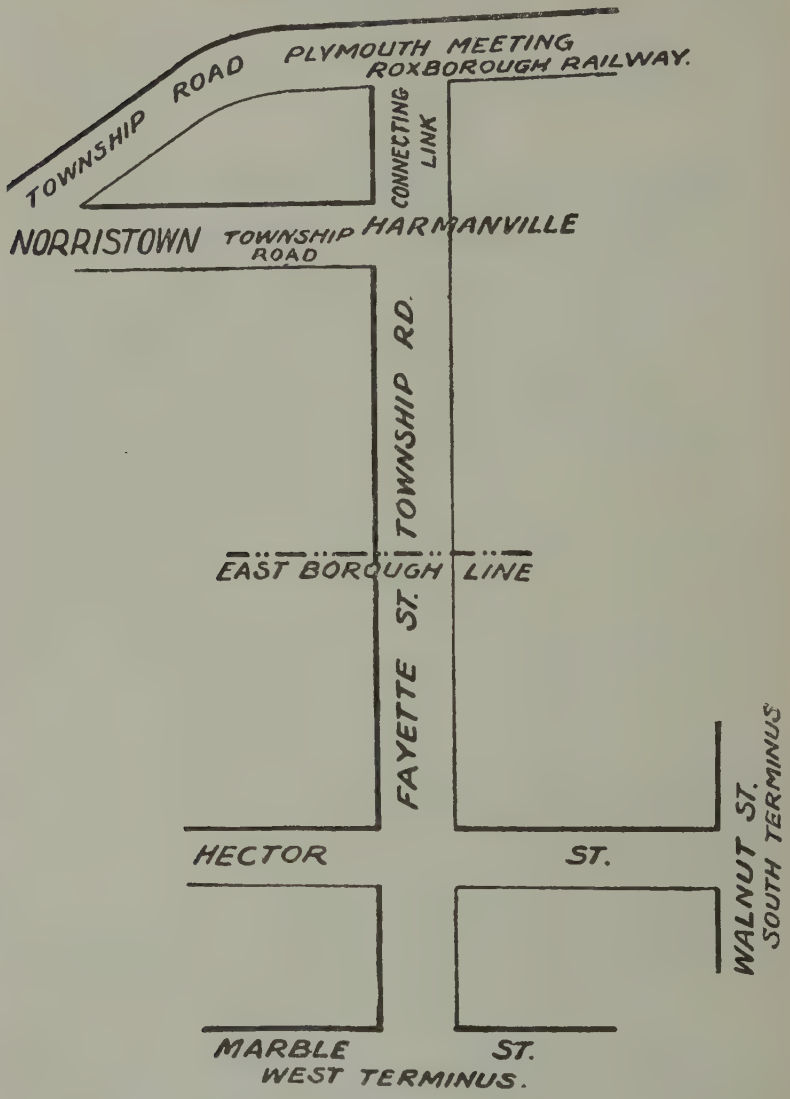
SWARTZ, P. J., filed the following opinion:

The borough of Conshohocken contends that the defendant companies cannot legally operate any cars within the borough limits until guard wires are put up as provided in the borough ordinance of January 10, 1894.

And the borough further contends that the Roxborough, Chestnut Hill and Norristown Railway operates its cars upon the streets of the borough without having first obtained the municipal consent to do so, and that such operation without consent is unlawful.

FINDINGS OF FACTS.

1. The Conshohocken Railway Company, one of the defendants, was incorporated under the Act of May 14, 1889, P. L.



211, to construct and operate a street passenger railway from Conshohocken and over township roads in Plymouth township to the borough of Norristown.

2. The Conshohocken Company obtained the consent of the municipal and township authorities, constructed its roadway and operated its cars in the borough of Conshohocken and township of Plymouth. The ordinance of the borough of Consho-

hocken granting the consent provided that the fare for a continuous ride within the borough limits should not be more than five cents. The ordinance further provided "that two guard wires be placed above said trolley wires to protect the same from other falling wires."

3. The Schuylkill Valley Traction Company was incorporated under the Act of Assembly of March 22, 1887, P. L. 8. This company leased the line of the Conshohocken Railway. It also leased other lines, and is operating a general system of passenger railways extending through Norristown, Bridgeport and Collegeville.

4. The Conshohocken Company constructed its line on Fayette street from the borough limits on the east to Marble street on the west. It also laid its tracks from Fayette street southward on Hector street to Walnut street. Hector street is two squares east of Marble street. In addition to this construction within the borough of Conshohocken a continuous line was built in Plymouth township from the borough limits, eastward to Harmanville, and thence northward to Norristown.

5. The Roxborough, Chestnut Hill and Norristown Company constructed a continuous line from Chestnut Hill to Norristown, passing through the village of Plymouth Meeting. This company also built an extension from Plymouth Meeting to Harmanville, thereby connecting with the Conshohocken Railway. By this connection the borough of Conshohocken has a continuous railway line to Chestnut Hill, as well as to Norristown, the two routes diverging at Harmanville.

6. An agreement was made between the Roxborough, Chestnut Hill and Norristown Company and the Schuylkill Valley Traction Company, whereby the former was to supply cars and men to run from Plymouth Meeting to Conshohocken. This contract provided, "While said cars are upon the tracks of the Schuylkill Valley Traction Company beyond Harmanville, and in return thereto, they shall in all respects be subject to the management of the traction company and the men subject to its rules and discipline."

The receipts on these cars were to be applied to the payment of the motormen and conductors on the cars and to the payment of one half the interest charges on the original cost of constructing the extension from Plymouth Meeting to Harman-

ville, and the balance was then to be equally divided between the two parties to the contract.

7. Under the agreement just cited the cars of the Roxborough, Chestnut Hill and Norristown Company run over and upon the tracks of the Conshohocken Railway, from Harmanville to Marble street, in Conshohocken, that is, they run the whole length of Fayette street, but do not go up and down Hector street, nor do they run to Norristown. They run direct to Plymouth Meeting. The traction company still runs its cars from Walnut and Hector streets to Norristown, but runs no cars from Marble street to Hector street on Fayette, except so far as the Roxborough cars are under its control and management. On cars running to Norristown the fare is five cents, or six tickets are sold for twenty-five cents. On the cars running to Plymouth Meeting there is a straight five-cent fare. No tickets are sold or accepted. Any car will take a passenger over its entire route within the borough limits for a single fare of five cents. In fact, one fare will carry the passenger from the foot of Fayette street to Plymouth Meeting or from Hector and Walnut streets to the Pennsylvania Railroad beyond Harmanville. A person desiring to go to Norristown from the corner of Fayette and Marble streets can take a car at that point, ride to Harmanville, change cars, and pay an extra fare to the Pennsylvania Railroad, or by walking the distance of two squares he can take a car at Hector street and ride to the Pennsylvania Railroad for a single fare.

8. The Roxborough, Chestnut Hill and Norristown Railway has no muncipal consent from the borough of Conshohocken to construct or operate a street railway within the borough limits. The same is true of the Schuylkill Valley Traction Company, except so far as the consent to the Conshohocken Railway Company inures to its lessee.

9. The Conshohocken Railway Company ratified the agreement made between the Schuylkill Valley Traction Company, and the Roxborough Company, recited in finding number 6.

10. Neither the Conshohocken Railway Company nor its lessee, the Schuylkill Valley Traction Company, put up guard wires as stipulated in the borough ordinance of January 10, 1894. These defendants express their willingness to put such guard wires in place. The plaintiff was not solicitous about these

wires. The road was in operation for some years and no formal demand was made upon the defendants prior to the present controversy and the filing of this bill.

CONCLUSIONS OF LAW.

1. Guard wires must be put in place as provided by the ordinance of January 10, 1894. A reasonable time for their erection must be given. Unless they are put in place within forty-five days from this date the plaintiff is entitled to an injunction restraining the operations of the defendants.

2. The Schuylkill Valley Traction Company did not enter upon any streets or highways in the borough of Conshohocken for the purpose of constructing a street railway. It is the lessee of the Conshohocken Railway and operates, as a part of its system, the road constructed by the Conshohocken Company. As the lessee of the latter company it may operate the railway without any independent municipal consent. The ordinance of January 10, 1894, contains the municipal consent for all that was done by the Conshohocken Company and its lessee.

3. The Roxborough, Chestnut Hill and Norristown Railway Company did not construct a street passenger railway in Conshohocken, nor is the company operating a railway within the borough limits.

4. The Conshohocken Company, by its lessee, is using every portion of the tracks located within the borough and the right to use such tracks is not forfeited by any abandonment; the company has fully complied with the ordinance giving the municipal consent except as to the erection of guard wires.

5. The bill must be dismissed if the defendants will put in place the guard wires within the time above specified, otherwise an injunction will be awarded.

REASONS IN SUPPORT OF OUR FINDINGS AND CONCLUSIONS.

That the failure to put up guard wires was not a matter of serious moment to the town council is evidenced by the long delay without any action on the part of the council to enforce this part of the ordinance giving the consent to the Conshohocken Company. The testimony of Mr. Murphy, a member of town council, indicates that the bill in equity was not filed to compel the construction of the guard wires. We think,

therefore, that a reasonable time should be allowed to put up these wires before an injunction is awarded.

The extension down Hector street to Walnut was built by the Conshohocken Railway and not by the Schuylkill Valley Traction Company. The allegation in the sixth paragraph of the plaintiff's bill to the contrary, is not sustained by any evidence.

That the Conshohocken Railway had the power to lease its road to the Schuylkill Valley Traction Company, is clearly established: Pinkerton v. Penna. Traction Co., 193 Pa. 229. When the borough of Conshohocken gave its consent to the Conshohocken Railway, the latter received the privilege to build and operate a passenger railway in Conshohocken and to exercise all the rights and powers of a street railway. The borough could not abridge these powers without the consent of the railway company. One of these powers was the right to lease its road to a traction company. The borough may not destroy this leasing power by demanding a new contract from the lessee. When the traction company leased the Conshohocken road, it succeeded to all the rights the latter held against the borough.

It is claimed that the Schuylkill Valley Traction Company's lease with the Conshohocken Company is not valid because the lines of the latter company are not confined to streets, but occupy township roads, that traction companies may not lease passenger railway companies whose lines are on township roads: Act of May 15, 1895, P. L. 63. It is provided, however, by another act of assembly passed the same day, P. L. 1895, page 65, that a traction company controlling other lines may operate as a general system so much of said different lines as occupy streets. Whatever the rights of the Schuylkill Valley Company may be on the public roads in Plymouth township, we think it is clear that the company under its lease with the Conshohocken Company may operate the Conshohocken lines so far as they are within the borough limits.

The Roxborough, Chestnut Hill and Norristown Company under its agreement with the Schuylkill Valley Traction Company is not operating its cars within the borough of Conshohocken. The undisputed evidence is that the cars are under the control and management of the traction company, and they run on the traction company's line. The name of the car is

immaterial so long as the fact remains that it is operated by the traction company. The traffic arrangement does not prove that the Roxborough Company operates a road in Conshohocken borough. A Reading Railway car may be carried over the lines of the Pennsylvania Railroad, but in such passage it is not operated by the Reading Company.

And now, December 23, 1901, the bill will be dismissed if the Conshohocken Railway or its lessee will within forty-five days from the notice of the filing of this opinion, erect the guard wires provided for in the ordinance of January 10, 1894, otherwise an injunction will be awarded as prayed for in the first prayer of the bill.

The company constructed the guards within the time specified, and thereafter the court entered a decree dismissing the bill.

Error assigned was the decree of the court.

William F. Meyers, for appellant.—As the traction company did not obtain municipal consent for its operation of the Conshohocken Railway, it cannot legalize the running of the Roxborough cars within the borough: Reeves v. Phila. Traction Co., 152 Pa. 153; Potter v. Scranton Traction Co., 176 Pa. 271.

Part of the road of the Conshohocken Company being on township roads, the traction company has no power to take a lease thereof, nor has the other company the power to grant such a lease.

The connecting link from Plymouth Meeting to Harmanville has been constructed illegally by the Roxborough, the Conshohocken having the legally adopted extension of route: Hannum v. Media, etc., Electric Ry. Co., 200 Pa. 44; Baily v. Fayette Gas-Fuel Co., 193 Pa. 175.

N. H. Larzelere, with him *H. M. Brownback*, for appellees.

Per Curiam, May 11, 1903:

This decree is affirmed on the opinion of the learned judge below.

Butterman *v.* McClintic-Marshall Construction Company.

Negligence—Master and servant—Safe place—Proximate cause.

A construction company, engaged in building a plant for a steel company, used jointly with the latter a siding with a down grade, and erected alongside of it a pole to aid in the unloading of cars. The pole was secured by guy ropes to the tracks in such a way that a car passing over the tracks would strike the ropes. The employees of the steel company permitted cars to get beyond their control on the down grade and run into the cars of the construction company, causing them to strike and break the rope, and let down the pole which struck one of the construction company's workmen and killed him. In an action by the widow of the deceased against the construction company to recover damages for his death, *held*, (1) that as an accident was inevitable if the rope should be struck by a moving car, it was the construction company's duty to foresee that cars might get beyond control and to provide for such a contingency; (2) that the defendant had not provided safe machinery or a safe place to work for its employees; (3) that a verdict and judgment for the plaintiff should be sustained.

Negligence—Master and servant—Fellow servant—Vice principal.

Where a construction company employs a person to superintend the erection of a plant, and no official of the company takes any part in the work, and the superintendent hires and discharges men and directs how and where they shall work, the superintendent is a vice principal, and if he is negligent in not providing suitable machinery and a suitable place to work, his employer will be liable to workmen for any resulting accident.

Negligence—Contributory negligence—Question for jury.

Where in an action to recover damages for the death of a person killed by a collision of cars, the question of the deceased's contributory negligence depends upon his position at the time of the collision, and the evidence as to where he was, is conflicting, the case must be submitted to the jury.

Argued Feb. 3, 1903. Appeal, No. 344, Jan. T., 1902, by defendant, from judgment of C. P. Montgomery Co., Dec. T., 1901, No. 1, on verdict for plaintiff, in case of Margarette Butterman v. McClintic-Marshall Construction Company. Before MITCHELL, DEAN, BROWN, MESTREZAT and POTTER, JJ. Affirmed.

Trespass to recover damages for death of plaintiff's husband.

Verdict for plaintiff for $3,500 subject to the question of law reserved.

On motion for judgment, WEAND, J., filed the following opinion:

Plaintiff sues for the recovery of damages resulting from the negligence of defendants which caused the death of her husband. The jury rendered a verdict for plaintiff.

The court reserved the question of law, whether there was any evidence to be submitted to the jury upon which the plaintiff was entitled to recover, and defendant has moved for judgment non obstante on the point reserved.

John Butterman, plaintiff's husband, went into the employ of the defendant company on the morning of October 31, 1900, and shortly after dinner was killed by being struck by a falling gin pole. Previous to that time Butterman had been a confectioner. He only accepted employment with defendants during a strike; had no previous knowledge of the work required of him, and there was no evidence that he had been instructed, or was aware of the danger connected with the erection of the gin pole.

The defendant company were engaged in the construction of the steels work at the new plant of the Dunmore Iron and Steel Company, at Dunmore, Pa., and on October 31, their employees were engaged in unloading columns, spans and girders from cars on a siding running from the Erie and Wyoming Valley Railroad into the Dunmore Iron and Steel Company's land.

To facilitate the unloading a pole was erected on the side of the siding and was supported by four guy ropes, two of which were fastened to the tracks of the siding in such manner that when in place a car could not pass without striking the rope. In order to let a car pass it was necessary to loosen the rope and pull it away from the track.

A crab or windlass was erected about fifty feet from the track and by this articles to be unloaded from a car were hoisted and lowered. Butterman's work was principally at the crab. The defendant company had arranged with the Iron and Steel Company to give notice when cars were to be moved on the siding so that the ropes could be in position to allow cars to pass in or out. On the day of the accident two cars were being unloaded at the gin pole by the defendant company, and beyond these, about thirty or thirty-five feet distant, were two

cars of the Iron and Steel Company being unloaded by the employees of said company. It became necessary to move these last mentioned cars a short distance, and they were placed in motion. Although efforts were made to stop them they got beyond control, and there being a descent in the tracks they ran into the cars at the gin pole, broke the rope, thus letting down the pole which struck Butterman, killing him instantly.

The court submitted the question of the defendant's negligence in not providing for such contingency, and of Butterman's contributory negligence, to the jury. Defendant's contention is, that the court should have given binding instructions for defendants, for three reasons, viz:

1. The proximate cause of the accident was the negligence or act of the Dunmore Iron and Steel Company gang over whom defendants had no control or power.

Admittedly the fastening of the guy rope to the track made it dangerous, for an accident was inevitable if the rope should be struck by a moving car. Hence, defendants' duty to provide against just such a contingency as happened. That this event should have been foreseen and provided against admits of no serious dispute, especially when the way in which the siding was constructed is understood.

It is agreed that if not struck, the rope would not break, and hence, what caused the accident was the striking of the other cars. The absence of a guard rail alone may not be the cause of an accident, but when a horse becomes frightened and falls down an embankment because of the absence of the guard rail, what is the proximate cause? The whistle which frightened the horse or the absence of the guard rail? And why in such cases is the township liable? Because it should have foreseen that horses will become frightened. So in this case, defendants must have foreseen by common experience that cars may get beyond control, or be set in motion by others. Sometimes by their own weight when on a descending grade, or by boys, or as in this case, when not properly managed. "The rule on this subject may be stated to be, that the defendant is not liable in negligence where no injurious consequence could reasonably have been contemplated as a result of the act or omission complained of, but it is liable where injuries might have been anticipated or foreseen:" 21 Am. & Eng. Ency. of Law (2d ed.),

486. The defendants knew that precautions were necessary where cars were to be moved over the siding by providing for notice where such moving was intentional, but made no provision for an involuntary movement of cars or for a movement of cars by any other than the engineer and fireman of a locomotive. They made no provision for accidents, and this was part of their duty. This is a case where the master did not provide suitable safe machinery or a suitable safe place for his employees; and the fact that this dangerous method was the ordinary method does not excuse, but rather increases the duty to foresee and provide against accidents such as the one that occurred. "The result must occur in the natural and probable course of events:" Pittsburg Southern Railway Company v. Taylor, 104 Pa. 306; Vallo v. United States Express Company, 147 Pa. 404.

The true rule is that injury must be the natural and probable consequence of the negligence; such a consequence as under the surrounding circumstances of the case might and ought to have been foreseen by the wrongdoer as likely to follow: Pittsburg Southern Railway Company v. Taylor, supra.

2. That defendants' foreman was a mere fellow-workman and in no legal sense a vice principal, and being a competent foreman defendants discharged their full legal duty, etc.

Defendants were contractors for the erection of a steel plant at Dunmore, Lackawanna county. Their shops were at Pottstown, Montgomery county, from which place the material was shipped to Dunmore. Frank Straight was employed to superintend the erection of the plant, and no member of defendants' company took any part in the work. Straight says: "I was sent up there as foreman of the construction of the steel work at the Dunmore Iron and Steel Company's plant." James Kearny says: "Straight hired and discharged the men. The work was erected under the supervision of Mr. Straight."

A vice principal for whose negligence an employer will be liable to other employees must be either, first, one in whom the employer has placed the entire charge of the business, or of a distinct branch of it, giving him not merely authority to superintend certain work, or certain workmen, but control of the business and exercising no discretion or oversight of his own, or, secondly, one to whom he delegates a duty of his own,

which is a direct personal and absolute obligation from which nothing but performance can relieve him: Hughes v. Leonard, 199 Pa. 123.

In this case we have the absolute duty resting upon defendants to provide suitable machinery and a suitable place to work: Ross v. Walker, 139 Pa. 42. They delegated this duty to Straight, who had sole control; he adopted the general method of erecting the pole; he had entire charge of the business; he was the company. He adopted the only means available, which the company knew was dangerous and which they knew he would adopt, for their own testimony shows it was the ordinary method. Straight therefore represented his principals in the discharge of an absolute duty, and became vice principal: 12 Am. & Eng. Ency. of Law (2d ed.), 946; Lewis v. Seifert, 116 Pa. 628; Provost v. Ice Co., 185 Pa. 617.

3. Butterman's contributory negligence. Defendants' contention is that Butterman being at a place of safety voluntarily placed himself in a place of danger.

The evidence as to Butterman's position when the collision became inevitable was conflicting, and therefore had to be submitted to the jury.

James Kearny said: "Before I saw Butterman struck and before the car began to move I do not remember of seeing Mr. Butterman;" and: "When Mr. Butterman was struck he was not at the crab. He was within twenty-eight feet of the bottom or base of the gin pole." Michael O'Horo said: "Mr. Butterman was alongside of me at the time, and he wanted to get a block to put ahead of the cars, and he just ran in to get the block under the car as it caught the guy rope. The car did not go six inches after he put in the block," etc.

"Q. And Mr. Butterman left the crab and ran down to put a block under your cars to keep them from going against the guy rope, didn't he? A. No, sir. Mr. Butterman was standing right alongside of one. He did not run from the crab at all. He was down there, because after we would get one column off the men that used to be working at the crab would come down and help to get it out. He was just coming back when the cars struck."

It is also evident that the deceased could not have run twenty-five feet before the moving cars on a steep downward

grade struck the other cars which could only have been twelve or eighteen feet from the moving cars when they started. We left this part of the case to the jury under instructions which are not complained of.

We see no reason to disturb this verdict.

Error assigned was in entering judgment on the verdict.

N. H. Larzelere, with him *Gilbert Rodman Fox* and *M. M. Gibson*, for appellant.

Montgomery Evans, with him *Jacob V. Gotwalts*, for appellee.

PER CURIAM, May 11, 1903:

The judgment is affirmed on the opinion of the learned judge below.

Hottle *v.* Weaver.

Evidence—Memorandum—Set-off.

In an action on a promissory note an unsigned memorandum made by the defendant in his book of original entries, is not admissible as evidence of set-off. It is only available to refresh the recollection of the witness.

Evidence—Lunacy—Lucid interval.

Statements made by a defendant lunatic within the period covered by the finding of the inquisition are inadmissible, unless the evidence shows that such statements were made during lucid intervals.

Argued Feb. 10, 1903. Appeal, No. 220, Jan. T., 1902, by defendant, from judgment of C. P. Bucks Co., Sept. T., 1901, No. 57, on verdict for plaintiff in case of Henry Hottle and Daniel M. Landis, Committee of the Person and Estate of Henry Hottle, a Lunatic, v. Milton H. Weaver. Before MITCHELL, DEAN, BROWN, MESTREZAT and POTTER, JJ. Affirmed.

Assumpsit on three promissory notes. Before YERKES, P. J.

At the trial it appeared that Henry Hottle was a lunatic, and that the defendant was a physician who had attended Henry Hottle and Hottle's deceased wife. The defendant's account against the wife was $546.50.

Elisha H. Weaver testified that at the time one of the notes was given there was an understanding that it was only to be paid in case Hottle administered on his wife's estate. The evidence showed that the wife left no estate. The witness was asked this question "Q. You said that you were present at the conversation which took place between Dr. Weaver and Mr. Hottle at the time of the execution and delivery of this note, and you had given what you understood to be said at the time. Was there or was there not anything more than a verbal understanding or agreement at that time? A. Yes, sir. Q. What further understanding was there? A. There was an understanding between the two parties and it was entered on the book. Q. Who entered it there? A. I did myself. Q. Can you turn to the entry that you made? A. I can. Q. Do so, please. A. I have it. Q. What do you find. Is that a written memorandum there? A. Yes, sir. Q. Who made it? A. I did."

Mr. Lear: "Q. It is not signed by anybody, is it? A. No, sir."

Mr. Ross offers the written memorandum in evidence. Mr. Lear objects. The objection is sustained, and the offer overruled, to which ruling of the court the defendant excepts, and the bill of exceptions is sealed. [1]

The written memorandum offered and rejected was as follows: "April 10, 1897. Received of Henry Hottle the sum of $500 on account of above bill on condition that if her legal heirs should administer in her estate, then I should collect the above bill of her estate and pay back the amount of the note and interest to Henry Hottle in five years after that, the note of $500 and the same amount of the above bill be paid in full."

Verdict for plaintiff for $1,796, on which judgment was entered for $1,651.02, all above that amount having been remitted by the plaintiff.

Errors assigned were (1) in overruling defendant's offer as above, quoting the bill of exceptions; (2) in overruling appellant's plea in abatement, thus refusing appellant's offer to traverse the inquisition de lunatico, holding that the adjudication was conclusive on appellant; (3) in refusing to receive any evidence of declarations made by Hottle during the

period covered by the retrospective finding with reference to the notes sued on having been lost.

Thomas Ross, with him *George Ross*, for appellant.

Henry Lear, with him *A. H. Kittleman*, for appellees.

PER CURIAM, May 11, 1903:

The memorandum in the defendant's book of original entries was in form a receipt by defendant for a conditional payment by plaintiff on account of the charges in the book against him. As against the note sued on the condition was in relief of defendant, and even if the receipt had been signed by him, it would not have been evidence in his favor, while being retained in his own possession. A party cannot make evidence for himself in that way. There was nothing therefore to take this entry out of the ordinary category of a written memorandum of a conversation or a contract made by the witness at the time but not signed by the parties, and available to refresh the witness's recollection, but not in itself evidence.

The second and third assignments of error are substantially that the court held the finding of lunacy by the inquisition to be conclusive. But it does not appear that any such ruling was made. A witness testified that he was present at a certain date and saw the defendant pay the plaintiff money, and was asked what the plaintiff (now a lunatic) said, when objection was sustained, the ground not appearing on the record but apparently being that the time was within the period covered by the finding of the inquisition. Such finding was prima facie evidence of lunacy at the time referred to by the witness and it does not appear that the court gave it any greater force. In refusing a new trial the judge said: "The reasons based upon the failure to admit evidence of statements by Mr. Hottle during lucid intervals, fall through their own weakness. There was no offer to prove such statements while lucid, and at the argument for a new trial there was no testimony to show that such evidence could be produced."

Judgment affirmed.

Lauer Brewing Company, Limited, *v.* Chmielewski.

Judgment—Opening judgment—Evidence—Appeals.

A judgment for goods sold and delivered will not be opened on the ground that the defendant was overcharged, where it clearly appears that he had received a postal card with notice of each consignment charged to him, had made no complaint at the time, had gone over his account at the plaintiff's office, and had agreed upon a balance and paid it, at a date subsequent to many of the items to which he objected.

On an appeal from an order refusing to open a judgment entered on a bond, the defendant cannot claim in the appellate court that he was erroneously sued as a purchaser, when as a matter of fact he was described in the bond as an agent of the plaintiff, if he made no such claim in the court below.

Argued Feb. 17, 1903. Appeal, No. 295, Jan. T., 1903, by defendants, from order of C. P., Schuylkill Co., Nov. T., 1900, No. 179, discharging rule to open judgment in case of Lauer Brewing Company, Limited, v. William D. Chmielewski et al. Before MITCHELL, DEAN, FELL, BROWN, MESTREZAT and POTTER, JJ. Affirmed.

Rule to open judgment.

Error assigned was order discharging rule to open judgment.

W. D. Seltzer, for appellant.

E. D. Smith, for appellee.

PER CURIAM, May 11, 1903:

Appellant petitioned to have the judgment opened on the ground that he was overcharged, but his evidence failed to sustain his complaint, it appearing clearly that he had received a postal card with notice of each consignment charged to him, had made no complaint at the times, and had gone over his account at the plaintiff's office, agreed upon a balance and paid it, at a date subsequent to many of the items he now objects to.

In this court he makes the additional claim that he was described in the bond as agent, but that the goods were charged to him as a purchaser, and the debt therefore is not within the

terms of the bond. The condition of the obligation was that he should "account for and pay . . . . the money due and owing to the said brewing company for all sales and shipments made by them and at his request," and as it is admitted that the business between them was all done the same way from the beginning, it is not apparent how merely calling him agent, erroneously or not, in the recital of the bond, can release him from the plain obligation of the condition. But as this point was not made and therefore not passed upon by the court below, it will be disregarded here.

Judgment affirmed.

Hinnershitz *v.* United Traction Company.

Equity—Equity practice—Exceptions to decree nisi—Filing exceptions nunc pro tunc—Appeals.

Where the court permits exceptions to be filed nunc pro tunc after the expiration of ten days from the entry of the decree nisi, and the exceptions are subsequently dismissed and a final decree entered, the statutory period of six months for taking an appeal begins to run from the entry of the final decree.

It is within the legal discretion of a judge sitting as a chancellor to permit exceptions to be filed nunc pro tunc after the expiration of ten days from the entry of a decree nisi.

The equity rules are the rules of all the courts, to be enforced as of course in all of them, and not relaxed or disregarded as matter of mere indulgence or convenience. But on the other hand they are like all other rules of practice, subject to the judicial discretion of the chancellor as to their strict enforcement under circumstances productive of injustice or exceptional hardship.

Street railways—Consent of landowner—Estoppel—Laches.

Where a street railway company lays a single track along a portion of its route on a turnpike road in such a way as to indicate plainly an intention to build a double track road and the single track is operated for two years, and the company then proceeds to lay a second track, and landowners do not file a bill until more than one third of the new track has been constructed, the plaintiffs in such bill will be barred by laches from relief in equity.

Street railways—Turnpike roads—Eminent domain—Act of May 14, 1889, *P. L.* 211.

The Act of May 14, 1889, sec. 17, P. L. 211, which gives to street railway companies the right to condemn a turnpike or turnpikes on making "compensation to the owner or owners thereof," does not include the

right as to the soil under the turnpike, and therefore as against the abutting landowners.

Argued March 2, 1903. Appeals, Nos. 305, 306 and 307, Jan. T., 1902, by plaintiff, from decree of C. P., Berks Co., Equity Docket, 1899, Nos. 752, 756, dismissing bill in equity in case of Harrison S. Hinnershitz et al. v. United Traction Company and East Reading Electric Railway Company. Before MITCHELL, DEAN, BROWN, MESTREZAT and POTTER, JJ. Affirmed.

Bill in equity for an injunction.

ENDLICH, J., stated the facts to be as follows:

1. In 1894, the East Reading Electric Railway Company, incorporated under Act of May 14, 1889, P. L. 211, in due form and with proper proceedings laid out a railway upon the Perkiomen and Reading Turnpike Road, in the township of Lower Alsace, connecting at both extremities, and at an intermediate point (the intersection of the turnpike and Friedensburg roads), with tracks already laid and to be laid.

2. Proceedings instituted under section 17 of the act of 1889 to assess damages to the turnpike company terminated in a consentable award of $8,000 in its favor, and an agreement of April 12, 1897, between the two companies for the payment thereof,—$1,000 immediately, $5,500 before the laying of the first track and within two years, and $1,500 before the laying of the second track and within ten years.

3. On October 5, 1894, the supervisors of Lower Alsace duly granted to the East Reading Electric Railway Company the right to lay a double track on the Friedensburg road (there being no record of previous authorization by the township authorities of the track already there, and the intention being to lay an additional one and at once to obtain and give municipal sanction for the entire construction), and connecting therewith, an electric street railway upon the turnpike road from the limits of the city of Reading, the line of said township, to a point considerably eastward of the same as well as of the Friedensburg road.

4. The construction thus authorized not having been made, but the purpose and intention to make it never having been abandoned, on March 25, 1897, the time for completing it was

extended for two years by resolution of the supervisors of the township, which adds a declaration, in effect, that a failure to lay a second track authorized upon the Friedensburg road should not operate to leave incomplete the construction of the railway upon the turnpike.

5. The latter road was projected and, in the presence of the township supervisors, surveyed and located, as a road of two tracks, the northerly one of which was constructed in 1897, connecting with the track originally laid on the Friedensburg road and together with it constituting, and being ever since operated as, a continuous line to Stony Creek, a settlement several miles distant in an easterly direction.

6. About the same time the second track upon the Friedensburg road was also constructed, and it has since been used and extended to Carsonia Park, situate about midway between Stony Creek on the east and the intersection of the turnpike and the Friedensburg road on the west. This second track connected by means of switches with the original one, some little distance eastwardly of said intersection and upon the Friedensburg road, and at Carsonia Park.

7. The business, etc., of the East Reading Electric Railway Company having been transferred under various and successive leases and agreements to the United Traction Company, a corporation under Act of March 22, 1887, P. L. 8, the latter company several weeks before the filing of these bills began the laying of a second or southerly track upon that portion of the turnpike which runs, partly at a heavy grade, from the city limits to the Friedensburg road, thus making the line of railway a double track line all the way to Carsonia Park.

8. In the meanwhile, proceedings were instituted for the freeing of a certain section of the turnpike road, including the stretch between the city limits and the Friedensburg road. These proceedings, pending at the time of the filing of these bills, have since been consummated. See Turnpike Road v. Berks Co., 196 Pa. 21.

9. The plaintiff in Nos. 751, 753 to 756 are respectively owners of property fronting upon the south side of said turnpike road, between the city limits and the Friedensburg road, under titles derived from parties owning the land on both sides of said turnpike road.

10. Beyond the occupation of such portions of the turnpike road as the respective plaintiffs in Nos. 751 and 753 to 756 presumably own the fee of, subject to the public easement, no injury peculiar to them or to the properties owned by them, respectively, has been shown to result or to be likely to result from the acts of the defendant companies complained of in the bills filed.

11. The plaintiffs in Nos. 751 and 753 to 756, at no time made any objection to the laying of the first track upon the turnpike road in front of their properties, nor any inquiry from the officers of the defendant companies concerning their intention to lay a second track south of the first; nor was any attempt made by either of said companies to conceal the purpose existing in this respect, or to deceive said plaintiffs concerning the same. On the contrary, the intent to make the road a double track road was indicated by the original location and survey, as well as by the presence of a double track line to the eastern limits of the city, and the building of a second track on the Friedensburg road eastwardly from a point close to its intersection with the turnpike road, thus obviously suggesting both the propriety and the design of connecting these two extremities by a second track south of and parallel with that first constructed.

12. Over one third of the new track had been laid before the plaintiffs' bills were filed.

13. The turnpike road, at the time of the filing of these bills, was not opened or graded to its full required width. The inconveniences complained of as likely to result to the traveling public from the occupation of the road by two railway tracks are not to be looked for if and when the road is fully opened and graded, the defendants having complied with the requirements of the order of January 2, 1900, in respect to the paving of the roadbed between their rails.

The court entered a decree nisi dismissing the bill. This decree was entered on January 6, 1902. No exceptions were filed within ten days. On March 10, 1902, the court permitted exceptions to be filed nunc pro tunc as of January 16, 1902. On March 27, 1902, exceptions were filed. On May 12, 1902, the exceptions were dismissed and a final decree entered dismissing the bill. On November 10, 1902, an appeal was taken to the Supreme Court.

Error assigned among others was the decree of the court.

Cyrus G. Derr with him *Edward S. Kremp*, for appellant. —The appellant's house and lot being bounded by the turnpike road, his title extends to the center of such turnpike road, and the construction of a railway on the turnpike road between the center line thereof and the appellant's house is the construction of a railway upon the appellant's property: Northern Cent. Ry. Co. v. Com., 90 Pa. 300; Pittsburg, etc., R. R. Co. v. Com., 104 Pa. 583; Fisher v. Coyle, 3 Watts, 407; Heilman v. Lebanon, etc., Ry. Co., 175 Pa. 188; Becker v. Lebanon, etc., Ry. Co., 188 Pa. 484.

The appellee companies are not invested with the right against the appellant's consent to impose upon his property a servitude additional to that involved in the maintenance of the turnpike road; the 17th section of the act of May 14, 1889, simply giving to the said companies the right to condemn pro tanto the right of the turnpike company and leaving the railway companies to acquire rights from individual landowners by contract and agreement, as in the case of individuals owning lands under ordinary township roads: Penna. R. R. Co. v. Montgomery Co. Pass. Ry. Co., 167 Pa. 62.

The first track constructed in 1897 being altogether northward from the center line of the turnpike, was not in any sense upon the appellant's property; his property being situate entirely southward from such center line, and the construction of such first track afforded the appellant no ground for objection or for a restraining order, and therefore his omission to object and his omission to file a bill to enjoin the construction of such first track does not estop the appellant from objecting to the construction of a second track on his side of the center line of the turnpike and so upon his individual property.

The time within which the appellee companies were, under the grant of permission by the township authorities, to construct their railway having long expired when they began to construct the track in question, such expiration of time was equivalent to an absence of consent and it was competent for the appellant to set up the absence of consent of township authorities and to object to the construction of such second track upon

that ground: Phila. & Reading R. R. Co. v. Berks Co. R. R. Co., 2 Woodw. 361.

The time for a landowner to object to the unlawful construction of a railway upon his property is when such construction is actually threatened, and therefore in the present case, the construction in 1897, at a point a quarter of a mile from the appellant's property, of a few hundred feet of a second track which was turned into and connected with the appellees' first track, so as to make it a mere siding to or turnout from the first track, was not a circumstance warranting or calling for the filing of a bill by the appellant and is not a circumstance which should estop him from objecting when, a few years later, it being proposed actually to construct a track upon his property, he filed the bill in this case.

John G. Johnson, with him *C. H. Ruhl* and *Richmond L. Jones*, for appellee.—The appeal should be quashed: Chester Traction Co. v. Phila. W. & B. R. R. Co., 180 Pa. 432; Palethrop v. Palethrop, 184 Pa. 585; Ward v. Letzkus, 152 Pa. 318; Wilson v. Keller, 195 Pa. 98; Barlott v. Forney, 187 Pa. 301.

Plaintiffs are estopped by their silence: Hopkins v. Catasauqua Mfg. Co., 180 Pa. 199; Penna. R. R. Co. v. Montgomery County Pass. Ry. Co., 167 Pa. 62; Heilman v. Lebanon, etc., Ry. Co., 175 Pa. 188.

Opinion by Mr. Justice Mitchell, May 11, 1903:

Appellees move to quash these appeals on the ground that they were not taken within the statutory limitation of six months. The cases were heard on bill, answer and proofs, and the opinion of the court filed on January 6, 1902, directing a decree nisi, which was duly entered by the prothonotary, and notice in due course given but to only one of the appellants' counsel. No exceptions were filed, and after ten days but before the actual entry of a final decree by the prothonotary in accordance with equity rule 65, appellants moved for leave to file exceptions nunc pro tunc, which after argument was granted. The exceptions were then filed, duly argued and considered and the opinion of the court thereon, dismissing them, was filed May 12, 1902. These appeals were taken November 10, 1902.

The motion to quash is based on the view that the leave of the court to file the exceptions nunc pro tunc indulged the plaintiffs only as to the filing of such exceptions, and did not extend the statutory limit of six months for taking an appeal. But this contention cannot be sustained. There was no final decree in fact entered before the filing of the exceptions, and from the moment they were put on the record no such decree could be entered until they were disposed of by the court. An appeal prior to that would have been quashed as premature. There was no final decree in the case therefore until May 12, 1902, and the time for appeal ran from that date.

The right of the court to allow the filing of exceptions nunc pro tunc, notwithstanding the language of equity rule 65 was elaborately considered by the learned judge below, and though it is only impliedly challenged here, it may be well to say that it was a matter within his legal discretion. The equity rules were promulgated by this court under the authority of an act of assembly, and it has been said that they "have all the force and effect of a positive enactment:" Cassidy v. Knapp, 167 Pa. 305. By this was meant that they were established as rules of equity practice in all the courts of the commonwealth, and must be followed and enforced as such. When they were first published there was a disposition in some districts to regard them as subject to the approval and adoption of the local courts. This view had to be corrected by the reversal of the decrees in Chester Traction Co. v. Phila., etc., R. R. Co., 180 Pa. 432, and Palethorp v. Palethorp, 184 Pa. 585. But it was not intended to say that they were inexorable under all possible circumstances, or to take them out of the ordinary equitable control of a chancellor in the application of chancery rules to exceptional cases. Such a construction might easily make them more oppressive than mandatory statutes. It was accordingly held in Brinton v. Hogue, 172 Pa. 366, that although the notice to the defendants to appear was in the old form and not in accordance with the revised and existing rules, yet as the defendants had in fact appeared and answered without objection, the departure from the rules had done no harm and would be considered as waived. So again in Barlott v. Forney, 187 Pa. 301, and Wilson v. Keller, 195 Pa. 98, it was said that though the statement of error required by the rules to be filed in the court below, is

not a mere formality but is intended to be enforced, yet in exceptional cases where no hardship will be imposed on the other party, it may as an act of grace be permitted to be filed nunc pro tunc.

These illustrations serve to show the scope of the equity rules. They are the rules of all the courts, to be enforced as of course in all of them, and not relaxed or disregarded as matter of mere indulgence or convenience. But on the other hand they are like all other rules of practice, subject to the judicial discretion of the chancellor as to their strict enforcement under circumstances productive of injustice or exceptional hardship.

On the substantial questions in the case the court below found among other facts, that the railway "was projected and in the presence of the township supervisors, surveyed and located, as a road of two tracks the northerly one of which was constructed in 1897, connecting with the tracks originally laid on the Friedensburg road;" that about the same time the second track upon the Friedensburg road was also constructed and it has since been used and extended to a point where it connects with the tracks on the turnpike; that the plaintiffs, other than the township, are owners of land on the south side of the turnpike, where the second track now objected to, is to be laid and that the additional servitude to which their right in the soil will be thereby subjected is the only damage shown in the case. He further found that "the plaintiffs at no time made any objection to the laying of the first track upon the turnpike road in front of the properties, nor any inquiry from the officers of the defendant companies concerning their intention to lay a second track south of the first; nor was any attempt made by either of said companies to conceal the purpose existing in this respect, or to deceive said plaintiffs concerning the same. On the contrary, the intent to make the road a double track road was indicated by the original location and survey, as well as by the presence of a double track line to the eastern limits of the city, and the building of a second track on the Friedensburg road eastwardly from a point close to its intersection with the turnpike road, thus obviously suggesting both the propriety and the design of connecting these two extremities by second track south of and parallel with that first constructed." Plaintiffs'

bills were not filed until more that one third of the new track had been constructed.

On these facts the court stated its conclusion that the construction of the double track on the turnpike within the limits of the township in 1897 was clear notice (in addition to the language of the township's resolution) of the construction put by the railway company upon the consent given to it, and "as regards the other plaintiffs they are shown to have been confronted in 1897 with unmistakable evidence that the road which was projected, and of which the whole northerly track was laid, was in truth a double track road, but temporarily operated in the condition in which it remained until 1899. With this evidence before their eyes, if property holders along the south side of the turnpike intended to object to the construction of the road as projected in its entirety, it was clearly their duty in fairness to defendants, to give notice of such intention." He therefore held that the plaintiffs were barred by laches from relief in equity. In this conclusion we concur.

The learned judge below however was of opinion that the right of eminent domain given by the act of May 14, 1889, to passenger railways as to turnpikes, included the right as to the soil under the turnpike, and therefore as against the abutting land holders. This is too broad a construction of the grant. Section 17, P. L. 211, provides that "any passenger railway company incorporated under this act shall have . . . . power . . . . to ascertain and define such route as they may deem expedient, over, upon, and along, any turnpike or turnpikes, ... and thereupon, ... to lay down, construct and establish a track or tracks for its use in the transaction of its business, ... Provided, That before such passenger railway company shall enter upon and use any such turnpike or turnpikes . . . . it shall make compensation to the owner or owners thereof for such occupation and use of said turnpike or turnpikes, in the mode provided in section fourteen hereof." The meaning of this is that the railway company may lay its tracks upon the turnpike without the consent of the turnpike company, subject to the condition that it must make compensation, "to the owner or owners thereof," that is, to the owner or owners of the turnpike, to wit: the turnpike company. It is a qualified and limited right of eminent domain as against the turn-

pike company. The abutting landowners are not owners of the turnpike in any proper sense of the term, but owners of ultimate fee in the soil, subject, to the servitude of the turnpike. There is nothing in the use of the double phrase "owner or owners," since the turnpike company as a corporation may be referred to either in the singular or the plural, and further since the preceding phrase naming the owners is also in the duplicate, "turnpike or turnpikes." It is the ordinary language of legislation to cover all the aspects of the case.

This construction is fortified by the reference to section 14. Compensation is to be made "in the mode provided in section fourteen hereof." That section gives to the passenger railways a similar right to use portions of "the track of any other company already laid down," but "before such use occurs compensation shall be paid to the corporation owning the track laid." In both sections alike, the compensation referred to is to be made to the corporation whose property or franchise is to be interfered with. The opposite view would establish a distinction between turnpikes and ordinary highways as to the rights of abutting landowners, giving the power of eminent domain in one case and not in the other, a distinction for which there is no warrant in the act. The legislature has not seen fit to confer any general right of eminent domain on passenger railways, and in the two special cases in the act of 1889, where it is given at all, it is given only as against other corporations whose rights may be specially interfered with, and whose consent or voluntary agreement presumably could not be obtained.

The decrees are affirmed at the costs of the appellants.

Gehr *v.* McDowell, Appellant. Strite, Appellant, *v.* Norton.

Wills—Sale of real estate—Intention of testator.

Where a testator directs that his real estate shall be sold when the youngest child of his son becomes of age, and further directs that in case a sale is made during the lifetime of his son, a sum shall be set aside for the support of his son, the sale will be made on the coming of age of the son's youngest child living at the death of the testator.

Trusts and trustees—Sale of real estate—Executors and administrators.

Where a testator has given to his executors powers to manage and sell his estate as trustees, and after the executors have performed all their functions as executors and have died, and the court has appointed a trustee of the estate, the trustee, and not an administrator d. b. n. c. t. a. is the proper person to make a sale of the real estate as directed by the will.

Argued March 9, 1903. Appeal, Nos. 340 and 341, Jan. T., 1902, by defendants from judgments of C. P. Franklin Co., Sept. T., 1902, Nos. 105 and 179, on case stated in cases of J. A. Strite, Administrator d. b. n. c. t. a. of William Wallace, Deceased, v. J. F. Norton and Hastings Gehr, Trustee of William Wallace, Deceased, v. Tench McDowell. Before MITCHELL, DEAN, BROWN and MESTREZAT, JJ. Affirmed.

Case stated to determine the marketability of real estate.

The case turned upon the will of William Wallace, deceased, the material portion of which was as follows:

"4th. Upon the arrival at the age of twenty-one years of the youngest child of my said son, Elijah, or upon the decease of my said son, Elijah if he should die without issue, I order and direct my executor to sell all my real estate, subject however to the charge of the one third or dower interest of my wife, Mary, therein, if she should then be living, and pay over to the child or children of my said son, Elijah, and the lawful issue of any of them who may then be deceased having left such issue, the proceeds of such sale, together with all the balance of my estate, except what is hereinafter reserved, the same to be equally divided between them, such issue of any deceased child or children of my said son, Elijah, however, taking only such share or part as his, her or their parent or parents would have taken, had he, she or they been living.

"In case such sale shall be made before the death of my said son, Elijah, I direct that my executor shall reserve and withhold from the distribution above directed the sum of Twenty Thousand Dollars ($20,000.00) which said sum I direct shall be invested in good public securities and the interest thereof, or so much thereof as may be necessary, shall be expended for the support and maintenance of my said son and his family remaining with him, in the manner hereinbefore ordered, and

upon the death of the said son, Elijah, the principal sum shall be paid over to his children in the manner as above provided."

JOHN STEWART, P. J., filed the following opinion:

It is a primary rule in the construction of wills, that effect is to be given to every clause, and each is to be construed in relation to the whole. The contention on the part of defendant that testator meant to include unborn children of his son, Elijah, as beneficiaries in the trust he created, would render meaningless and nugatory that clause which provides a maintenance for the son in the event of a distribution of the estate during the latter's life, and which is as explicit and direct as any in the will. Possibility of birth of issue, in contemplation of law, ceases only with the life of the parent; and if unborn children were to be included, it would follow necessarily that no distribution could be made in any event during Elijah's life; whereas in the plainest way the testator has indicated a different purpose by making what he regarded a suitable provision for the maintenance of Elijah in the event of the distribution occurring before his death. The inference is irresistible that in creating the trust testator had regard to the children of his son then living, or who might be living at testator's death, and none other. It may have been an omission or oversight not to provide for after-born children if any there might be, we cannot say; if so, it is too late to correct it now; the will as written is anything but obscure; its meaning is plain and obvious. The fact that Elijah has no other children than those who were living at testator's death, relieves the case of all appearance of hardship and inequality.

Our conclusion is that the youngest child of Elijah having attained the age of twenty-one years, the period of sale fixed in the will has been reached, and the real estate of testator is now to be sold.

By whom? Is the other question raised in the case stated.

The executors of William Wallace, or such of them as survived, had fully settled and accounted for the personal estate; and nothing remained to be done except in connection with the trust he created. Further on, but one of these executors survived. This was the situation when, at the request of Elijah Wallace, and with the assent of the surviving executor, William

W. Fisher, Hastings Gehr, Esq., was appointed trustee, not however displacing the executor, but as an associate in the trust. What remained at that time to do, was (1) to invest the remainder of the personal estate, as well as the income and interest therefrom, and the rents and income from testator's real estate; (2) out of the rents and income of the real estate to keep the real estate in repair, pay the taxes, keep it sufficiently insured, and pay over to the widow the one third of what remained yearly during her life; (3) out of the whole income to provide a suitable support and maintenance for testator's son Elijah and his family, and a proper education for his children, leaving it to the executors to determine, in their discretion, how much of said income should in this way be expended; (4) upon the arrival at the age of twenty-one years of the youngest child of Elijah, or upon Elijah's decease, to sell the real estate and distribute the entire estate as follows: in the latter event, to divide the same to and among the said children of Elijah, but if the conversion take place during Elijah's life then $20,000 to be withheld from distribution, this sum to be invested by the executors in public securities, and the interest thereof, or so much as may be necessary to be expended for the support and maintenance of Elijah and his family remaining with him, and upon his death the principal sum to be divided among Elijah's children.

Mr. Gehr continued acting with the last surviving executor, until the latter's death, and since that time has been acting as sole trustee.

It is to be observed that the above provisions in the will are wholly outside the ordinary duties of an executor. The entire balance of the estate, after payment of debts, etc., is given to the executors in trust, to manage, control and dispose of according to testator's wishes as in his will declared. It is this balance, this trust estate, that we are dealing with, and with this, an administration with will annexed can have no relation whatever. "The transfer of real property," says GIBSON, C. J., in Ross v. Barclay, 18 Pa. 179, "is governed by the lex loci rei sitæ: and no statute of Pennsylvania empowers an administrator with the will annexed, to execute a trust of land confided to an executor by title or by name, for any other purpose than to sell for payment of debts. By force of the act of February 24,

1834, relating to executors and administrators, he may execute a power to sell in order to bring the land into a course of administration but not to execute a trust for a collateral purpose; for instance to manage the property and invest the proceeds for accumulation; or to maintain the widow and children, or to turn the land into money for the convenience of partition; or to exercise any discretionary power confided to his predecessor in the administration for his personal fitness and fidelity. For purposes purely administrative, the 13th and 14th sections give the devise of a power the effect of a devise of the title, and the 67th section puts an administrator with the will annexed on a footing with a surviving executor, but not on a footing with a testamentary trustee." Clearly the administrator with will annexed, in the present case, is without authority to convey the real estate. Has Mr. Gehr, the acting trustee, such authority? That depends on the legal sufficiency of his appointment. Was his appointment within the power of the court? This is answered by the Act of April 9, 1849, sec. 2. It was under this act that he was appointed, and its language is explicit and unmistakable, giving to the court power to appoint a trustee in place of one of several executors, in all cases of trust where any of the executors of the will resign, die or are dismissed, whether the duties of the trust were to be executed by them by virtue of their office, or otherwise. Legally appointed and duly qualified, Mr. Gehr is invested with all the powers committed by the will to the executors, whose successor he is. Included in these is the power and duty to sell testator's real estate, at a fixed period, which we have decided was reached when the youngest child of Elijah living at testator's death, attained the age of twenty-one years.

And now December 17, 1902, judgment ordered on the case stated in favor of plaintiff and against the defendant for the sum of $2,000.

Error assigned was the judgment of the court.

Garnet Gehr, for appellant in No. 340.

J. A. Strite, for appellant in No. 341.

Sharpe & Elder, for appellee, in No. 340 were not heard.

PER CURIAM, May 11, 1903:

These judgments are affirmed on the opinion of the court below in Gehr v. McDowell.

Wallace's Estate.

Guardian and ward—Trust and trustees—Removal of trustee.

While a guardian should not be appointed trustee of the estate in which his wards are interested, yet if he has been so appointed, he will not be removed as trustee after all the minors are of age, merely because of the irregularity of his appointment.

Argued March 9, 1903. Appeal, No. 353, Jan. T., 1902, by E. W. Wallace et al., from decree of O. C. Franklin Co., O. C. Docket, 30, page 402, discharging rule to remove trustee in estate of William Wallace, deceased. Before MITCHELL, DEAN, BROWN and MESTREZAT, JJ. Affirmed.

Rule to discharge trustee.

From the record it appeared that on September 31, 1888, Hastings Gehr was appointed by the orphans' court guardian of the minor children of Elijah W. Wallace. On June 25, 1889, the court appointed Gehr trustee of the estate of William Wallace. Elijah W. Wallace was a son of William Wallace. Gehr continued to act as guardian and trustee until all of his wards became of age. After the last of the minors had become of age, all of the parties in interest in the estate of William Wallace secured a rule on Gehr to show cause why he should not be discharged as trustee.

JOHN STEWART, P. J., filed the following opinion:

Had it been brought to the attention of the court when Mr. Gehr's appointment as trustee was asked for, that he had been appointed guardian of the minor children of Elijah W. Wallace's minor children, his appointment as trustee would not have been allowed, except upon his declining or resigning the other trust. The reasons that would then have operated against his appointment as trustee, however, do not now require his discharge. The children of Elijah W. Wallace are no longer minors. Mr.

Gehr is not in charge of conflicting interests, he is simply trustee of an estate in which no one is interested who is not sui juris.

Now December 17, 1902, rule discharged at the cost of petitioners.

Error assigned was the order of the court.

J. A. Strite, for appellants.

Sharpe & Elder and *Garnet Gehr*, for appellee.

PER CURIAM, May 11, 1903:
Judgment is affirmed on the opinion of the court below.

Brown *v.* White, Appellant.

Negligence—Ice on pavement—Question for jury.

It is not necessarily negligence to attempt to pass over even a "noticeable accumulation" of ice on a pavement. That may depend on the size and shape of the accumulation, the obviousness and magnitude of the danger, the means at hand of avoiding it, and other circumstances.

In an action by a woman to recover damages for personal injuries sustained by a fall on an accumulation of ice on a pavement, where it appears that the plaintiff had passed over the obstruction safely the evening before, the question whether it was prudent in her to try to do so again is for the jury.

In such a case the plaintiff is not bound affirmatively to disprove negligence. It is sufficient for her to make out a case of injury from negligence of the defendant without disclosing negligence on her own part. Whether she used due care under the circumstances is for the jury.

In such a case if the evidence shows "a generally slippery condition of the pavements" it is impossible for a pedestrian to avoid some risk if she travels them at all; whether she used due care under the circumstances is for the jury.

Argued March 9, 1903. Appeal, No. 304, Jan. T., 1902, by defendant, from judgment of C. P. Franklin Co., April T., 1900, No. 393, on verdict for plaintiff in case of Annie Brown v. Hiram M. White. Before MITCHELL, DEAN, BROWN and MESTREZAT, JJ. Affirmed.

Trespass to recover damages for personal injuries sustained from a fall on a pavement.

At the trial it appeared that the plaintiff, a woman seventy-two years old fell on the pavement in front of defendant's premises on North Main street, Chambersburg, Pennsylvania. The accident happened about six o'clock in the morning, and the evidence showed that there was some accumulation of ice on the pavement.*

Defendant presented these points:

If the jury believe that there was a noticeable accumulation of ice the evening before at the place where the accident occurred, and that the plaintiff passed over the same the evening before the accident occurred, and knew of the existence of the same, then the plaintiff, in attempting to pass over the same place at the time of the accident, was guilty of contributory negligence and cannot recover. *Answer:* I refuse that point. [1]

If the jury believed there was a generally slippery condition of the pavements caused by rain and freezing weather, on the morning the accident occurred, then the plaintiff was bound to use more than ordinary caution, and there being no evidence that she did so, the plaintiff was guilty of contributory negligence and cannot recover. *Answer:* I refuse to instruct you as requested in the third and fourth points of law submitted by counsel for defendant for the reason that whether or not the plaintiff was guilty of contributory negligence is a fact to be determined by you from the evidence in the case and the instructions I have given you as to the law. It is not for the court to declare it as a fact or to determine it. We cannot say as a matter of law that an attempt to pass over a noticeable accumulation of ice, is negligence per se; nor can we say as a matter of law that even though the pavements were generally icy and slippery, plaintiff was guilty of contributory negligence. These are questions to be decided by the jury under the evidence as to the circumstances and the law as we have declared it. [2]

The court charged in part as follows:

[Counsel have asked me to direct your attention to some evidence which was given in the case on behalf of the defendant

* This case has been twice in the Supreme Court. See 202 Pa. 297.—Reporter.

on the night before this accident occurred. Mr. Rinehart, it was—he was the occupant of some rooms on the upper story of the defendant's house—he was called and testified that that night, having reason to believe the weather would be extremely severe, he turned off the water from the house so that there could be no flow through the pipes, and his wife testified that the next morning she went to the place were he had turned the water off and turned it on. If you believe that testimony, it would follow that there was no water in the pipes of that house (I am not speaking of the drain pipe that led from the sink down into the archway) from the time Mr. Rinehart turned it off until his wife turned it on next morning. It was testified by Mr. Rinehart that he had notified the occupants of the Ludwig and Faulkner rooms that they should supply themselves with water, that he was about to turn the water of the house off.

Now, you will consider that testimony in connection with the other testimony in the case and give it whatever weight you think it should have in connection with the determination of the question whether the ice was formed from the water that went down the drain pipe that night. If the ice was formed from water that went down the drain pipe from the sink, it could not have been from water flowing into the sink from the pipes of the house, but the pipe that led from the sink down to the archway was not connected with the water pipes of that house that night.] [3]

Verdict and judgment for plaintiff for $1,554.66. Defendant appealed.

Errors assigned were (1–3) above instructions, quoting them.

W. Rush Gillan of *Gillan & Gillan*, with him *Gehr & Gehr* and *J. A. Strite*, for appellant.

I. C. Elder, of *Sharpe & Elder*, with him *Horace Bender*, for appellee.

Per Curiam, May 11, 1903:

The third point of defendant could not have been affirmed by the judge at the trial. It is not necessarily negligence to

attempt to pass over even a "noticeable accumulation" of ice on the pavement. That may depend on the size and shape of the accumulation, the obviousness and magnitude of the danger, the means at hand of avoiding it, and other circumstances. In the present case the plaintiff had passed over the obstruction safely the evening before, and whether it was prudent in her to try to do so again was for the jury.

Nor could the fourth point have been affirmed. The plaintiff was not bound affirmatively to disprove negligence. It was sufficient for her to make out a case of injury from negligence of the defendant without disclosing negligence on her own part. If the evidence showed "a generally slippery condition of the pavements," then it was impossible for her to avoid some risk if she traveled them at all, and whether she used due care under the circumstances was for the jury.

The remaining assignment of error is to a part of the charge in which the judge called attention to some of the evidence favorable to appellant. There was considerable testimony as to the source from which the water came which formed the ice in question. The defendant sought to prove that it could not have come from his premises, and the judge called the attention of the jury to the turning off of the water the night before, as tending to sustain that view. He could not have gone further and charged that that single act was a complete defense without disregarding the other evidence. He properly directed the jury to consider it all together.

Judgment affirmed.

Reid *v.* Linck, Appellant.

Negligence—Unguarded elevator shaft—Province of court and jury—Evidence.

In an action against the owners of a store by a customer to recover damages for injuries sustained by falling into an unguarded elevator shaft, it appeared that on the day of the accident plaintiff went to the store to purchase an article of which he had a sample. He showed the sample to a salesman, who after examining it said: "I think we have a piece like that in the back room. We will go and see." He then turned and walked into a storage room through which it was necessary to go to reach the back room. Plaintiff followed the salesman. The room was so dark

that he lost sight of the salesman, but followed what he supposed to be the sound of his footsteps to the other end of the room, where he fell into the unguarded elevator shaft. There was testimony that it was not unusual for customers of the store to walk through this room in order to reach the backroom. *Held*, that the case was for the jury and that a judgment and verdict for plaintiff should be sustained.

In such a case where one of the defendants testified that he did not consider the place dangerous, it was not error to allow him to be asked on cross-examination whether other persons had not fallen down the elevator shaft before. Such question was proper to show his knowledge of the dangers of the place, and to affect his credibility.

Argued March 17, 1903. Appeal, No. 12, Jan. T., 1903, by defendants, from judgment of C. P. Lycoming Co., March T., 1902, No. 2, on verdict for plaintiff, in case of David Reid v. J. H. Linck, L. W. Tallman, S. Q. Mingle and A. W. King, executor of the Estate of H. B. Melick, Deceased, trading as the Williamsport Hardware & Stove Company. Before MITCHELL, DEAN, FELL, BROWN and POTTER, JJ. Affirmed.

Trespass to recover damages for personal injuries. Before HART, P. J.

The facts appear by the opinion of the Supreme Court.

Defendant presented the following points:

1. That under all the evidence in the case the verdict of the jury must be for the defendant. *Answer:* We refuse this point. [1]

4. If the jury find from all the evidence that Reid, the plaintiff, was not invited by J. H. Linck, the defendant, or his employees, to enter the oil or storage room, then J. H. Linck, the defendant, owed Reid, the plaintiff, no duty, and was not guilty of any negligence and the verdict of the jury must be for the defendant. *Answer:* We answer that point as follows: If the jury find from the evidence that Reid, the plaintiff, was not invited to enter the oil or storage room, or that persons visiting the store on business were not in the habit of going into the said room, or likely to go therein, then J. H. Linck, the defendant, owed Reid, the plaintiff, no duty, and was not guilty of any negligence, and the verdict of the jury must be for the defendant. [2]

6. If the jury find from all the evidence that Reid was a man of ordinary sense, able to perceive that there was danger if he

proceeded along the floor to the north end of the oil or storage room, although he was unable to discern the particular character of the danger, and yet he elected to proceed in such a dangerous course, he was guilty of contributory negligence, and the verdict of the jury must be in favor of the defendant. *Answer:* It is for the jury to say, if they find the facts as in this point stated, whether the plaintiff was guilty of contributory negligence. If you find that he was negligent and that such negligence contributed to the injury which he sustained, then your verdict must be for the defendant. [3]

7. If the jury find from all the evidence that after Reid entered the oil room or storage room he found himself in a place requiring precaution, it then and there became the duty of Reid to take the course which he knew to be safe and return into the storeroom; and if the jury further find from all the evidence that Reid elected to take the questionable or dangerous course, knowing that there was a safe course open to him, then he is guilty of contributory negligence, cannot recover in this case, and the verdict of the jury must be in favor of the defendant and against the plaintiff. *Answer:* It is for the jury to say, if they find the facts as in this point stated, whether the plaintiff was guilty of contributory negligence. If you find that he was negligent, and that such negligence contributed to the injury which he sustained, then your verdict must be for the defendant. [4]

8. If the jury find from all the evidence that Reid followed Knapp into the elevator or storage room, that Reid lost Knapp, after such loss Reid found himself in a dark place without sufficient light to discern his path with safety, it then became Reid's duty, under such circumstances, not to proceed any further in his search for Knapp, but to step back into the storeroom by the safe course which he had come; and if Reid knowingly persisted in going forward in the darkness it was at his own risk, he was guilty of contributory negligence, cannot recover in this case, and the verdict of the jury must be for the defendant. *Answer:* It is for the jury to say, if they find the facts as in this point stated, whether the plaintiff was guilty of contributory negligence, and if you find that he was negligent and that such negligence contributed to the injury which he sustained, then your verdict must be for the defendant. [5]

9. However much the defendant may be at fault, if this plaintiff himself was guilty of negligence in going up the elevator or storage room with which he was not acquainted, and under the conditions which he described, to wit: where it was so dark he could not see Knapp, walked with cautious footsteps, touching the oil flasks as he went, along where he could not see for a distance of thirty feet, and if his negligence contributed in the slighest degree to the injury which he suffered, he cannot recover, and the verdict of the jury must be for the defendant. *Answer:* If the jury find the facts in this point stated, then it is for the jury to say whether such facts constitute negligence on the part of the plaintiff. With this qualification, this point is affirmed. [6]

10. Negligence is want of ordinary care which a party ought to observe under the peculiar circumstances under which he is placed; that Reid could not or did not foresee the consequences of his negligence does not exempt him from the liability therefor. *Answer:* Negligence is want of ordinary care which a party ought to observe under the peculiar circumstances under which he is placed. The fact of the plaintiff's negligence, assumed in this point, is a question for the jury under all the evidence. [7]

The court charged in part as follows:

[If you find that the elevator room, in which this elevator shaft was situated, was a room into which persons visiting that store on business might reasonably be expected to go, were invited to go, or were in the habit of going, it would then be the duty of the Williamsport Hardware & Stove Company to have so maintained and guarded it as to protect persons likely to pass into the room from falling or slipping therein, in the exercise of ordinary care on the part of such persons. Whether or not this was a room or place into which such persons visiting the store on business were likely to go, be invited to go, or were in the habit of going, is a question of fact for you to determine under all the evidence in the case. If it was not such a room or place, the Williamsport Hardware & Stove Company were not bound to guard the elevator shaft so as to protect persons who were likely to go into the store or into that place from slipping or falling therein. But if it was such a room or

place as persons visiting the store on business were likely to go or be invited to go, or were in the habit of going, then the Williamsport Hardware & Stove Company were bound to so guard and protect the elevator shaft that such persons would not slip or fall therein in the exercise of ordinary care.] [11]

Verdict and judgment for plaintiff for $2,350. Defendant appealed.

Errors assigned were (1–11) various instructions, quoting them; (12–15) rulings on evidence, quoting the bill of exceptions.

H. T. Ames, with him *T. H. Hammond*, for appellant.—The implied invitation to a customer by a merchant extends only to that part of the premises necessary for the transaction of the business in hand; if a customer goes upon any other part of the premises without invitation, he is a mere licensee: Flannigan v. Glucose Co., 11 N. Y. Supp. 688; Lackat v. Lutz, 94 Kentucky, 287 (22 S. W. Repr. 218); Pierce v. Whitcomb, 48 Vt. 127; Sweeny v. Old Colony, etc., R. R. Co., 92 Mass. 368; Zoebisch v. Tarbell, 92 Mass. 385; Sweeny v. Barrett, 151 Pa. 600.

One in entering and leaving premises must use the ordinary and customary way of access, and if he adopt some other way he becomes a mere licensee, and cannot recover for defects outside or not substantially adjacent to the regular way: Gaffney v. Brown, 150 Mass. 479 (23 N. E. Repr. 233); Shearman & Redfield on Negligence, 704; Armstrong v. Medbury, 67 Mich. 250 (34 N. W. Repr. 566); Allen v. Johnston, 76 Mich. 31 (42 N. W. Repr. 1075); Sweeny v. Barrett, 151 Pa. 600; Johnson v. Wilcox, 135 Pa. 217; Smith v. New Castle, 178 Pa. 298; Erie v. Magill, 101 Pa. 616.

One who enters a dark passageway without a light does not observe due care: Wilkinson v. Fairrie, 1 Hurlstone & Coltman, 633; Forsyth v. Boston & Albany R. R. Co., 103 Mass. 510; Parker v. Portland Pub. Co., 69 Maine, 173; Pierce v. Whitcomb, 48 Vt. 127; Sweeny v. Barrett, 151 Pa. 600; Johnson v. Wilcox, 135 Pa. 217; Gaffney v. Brown, 150 Mass. 479 (23 N. E. Repr. 233); Hart v. Grennell, 122 N. Y. 371 (25 N. E. Repr. 354).

Where there is evidence tending to establish the existence

of facts hypothetically stated in the point presented for instructions, the proponent has a right to specific instructions upon the legal effect of these facts, and it is error to refer the legal effect to the jury: New York, etc., Railroad Co. v. Enches, 127 Pa. 316; Ham v. Del. & Hudson Canal Co., 142 Pa. 617; King v. Thompson, 87 Pa. 365.

It is the general rule that in an action for negligence evidence is not admissible of other independent and disconnected acts of negligence, as going to show negligence in the case at bar: Parker v. Portland Publishing Co., 69 Maine, 173; Schoonmaker v. Wilbraham, 110 Mass. 134; Baltimore, etc., Railroad Co. v. Woodruff, 4 Maryland, 242; Carson v. Godley, 26 Pa. 111–121; Hubbard v. R. R. Co., 39 Me. 506.

Seth T. McCormick, for appellee.—It is submitted for the appellee that the following cases sustained the trial court and rule the case at bar, applying the rule of law contended for by the appellee to facts almost precisely similar to the facts in the case at bar: Clopp v. Mear, 134 Pa. 203; McKee v. Bidwell, 74 Pa. 218; Gilbert v. Nagle, 118 Mass. 278; Barowski v. Schulz, 112 Wis. 415 (88 N. W. Repr. 236); Elliott v. Pray, 92 Mass. 378; Rhodius v. Johnson, 56 N. E. Repr. 942; Smith v. Parkersburg Co-op. Assn., 37 S. E. Repr. 645.

Linck had previously testified that he had not considered the elevator shaft a dangerous place, and the court very properly admitted the question to show notice to Linck of the dangerous character of the unprotected elevator shaft: Carson v. Godley, 26 Pa. 111; Wooley v. Railroad Co., 83 N. Y. 121; Morse v. Minneapolis, etc., R. R. Co., 30 Minn. 465.

Opinion by Mr. Justice Fell, May 11, 1903:

The defendants were engaged in the hardware and stove business, and occupied a building on the first floor of which was the main storeroom, extending the entire length of the building, and two other rooms known as the storeroom and the wareroom. In the middle of the store, between the storeroom and the wareroom, was a storage room eight and a half feet wide and fifty feet long, which opened into the other rooms. At one end of this room there were stairs leading to the cellar, and at the other end an elevator shaft about six feet square.

The room was dimly lighted by a window opening into the wareroom. On the morning of the accident, plaintiff went into the store to buy a frame for a stove grate, carrying with him one he had bought at this store two years before. He showed the grate to one of the defendants' salesmen, and asked him for a new one like it. The salesman, after examining it, said: "I think we have a piece like that in the back room. We will go and see." He then turned and walked into the storage room. The plaintiff followed him. The room was so dark that he lost sight of the salesman, but followed what he supposed to be the sound of his footsteps to the other end of the room, where he fell into the unguarded elevator shaft. There was testimony that it was not unusual for customers of the store to walk through this room in order to reach the storeroom or the wareroom.

Seven of the assignments of error are to the refusal of the court to give instructions that would have withdrawn the case from the jury. This would have been error. The jury were instructed that if the plaintiff was not invited to enter the room, or if persons visiting the store on business were not in the habit of going into the room or likely to go into it, the defendants were not liable in this action; but that if in the usual course of business the room was used by customers as a passageway to other rooms, it was the duty of the defendants to protect the elevator shaft. And it was left to the jury to say whether on the occasion of the plaintiff's injury, what was said by the salesman constituted an invitation to accompany him in search of the article needed. This instruction was correct and covered the whole ground of the defendants' negligence. The point of the case was whether the plaintiff had been invited, or whether there was an implied invitation in view of the fact that the room was generally used by customers as a passageway.

It was not error to allow one of the defendants to be asked on cross-examination whether other persons had not fallen down the elevator shaft before this accident. He had testified that he did not consider the place dangerous, and this question was proper to show his knowledge of its dangers and to affect his credibility.

The judgment is affirmed.

Black, Appellant, *v.* Black.

Partition—Agreement of parties—Master.

Where a master appointed to make partition reports that at a meeting of the parties in interest it was agreed by all persons present that the land in question could not be conveniently divided into as many purparts as there were parties entitled, one of the parties who was present cannot, after the expiration of sixteen months, and after many meetings, and when the proceedings were almost at a close, object to the plan of division suggested by the master, and deny the validity of the agreement reported by the master. In such a case it is immaterial that the agreement was not in writing, and that no note of it appeared in the record.

Practice, C. P.—Rules of court—Agreements of attorneys.

A rule of court requiring agreements of attorneys touching the business of the court to be in writing has no application to an agreement made in open court or before a master, during the trial of the cause, nor to one on which the court or the master at the time is asked by the parties to act.

Appeals—Assignments of error—Partition—Exceptions.

On an appeal from a decree in partition an objection to the manner in which the bidding was conducted will not be considered by the appellate court, where such objection was not raised by the exceptions to the master's report nor by the assignments of error to the order of the court.

Argued March 19, 1903. Appeal, No. 177, Jan. T., 1902, by Frederick Black, from decree of C. P. Delaware Co., Sept. T., 1899, No. 102, on bill in equity in case of Edgar N. Black, Frederick Black and Daniel N. Black v. Mary K. L. Black et al. Before MITCHELL, DEAN, FELL, BROWN and POTTER, JJ. Affirmed.

Bill in equity for partition. Before JOHNSON, P. J.

The facts appear by the opinion of the Supreme Court.

Error assigned was the decree of the court.

Lucien H. Alexander, with him *W. Royer Fronefield*, for appellant.

Edward H. Hall and *N. Dubois Miller*, for appellees.

OPINION BY MR. JUSTICE FELL, May 11, 1903:

The master appointed to make partition reported that at a meeting of the parties in interest it was agreed by all persons

present that the land described in the bill could not conveniently be divided into as many purparts as there were parties entitled. The appellant was present at this meeting. Testimony was then taken by the master to ascertain whether the land could be divided at all and if so into how many purparts. Several plans of division were suggested by the witnesses called. The appellant testified in favor of a division into nine purparts. The master found that the weight of the testimony was in favor of a divison into seventeen purparts, and he valued the purparts and reported: "The master finds after a personal examination of the premises described in the bill and after obtaining the opinion of credible persons as to the feasibility of a division thereof, and the value of the same, that the said real estate cannot be parted or divided in such a way as to accommodate all parties in interest without prejudice to or spoiling the whole, but that the same can be parted or divided into seventeen purparts without regard to the number of parties as heretofore set out, and has described, valued and appraised the said purparts respectively as follows."

Sixteen months after the agreement mentioned was made, there was a meeting of the parties in pursuance of a rule to accept or refuse the several purparts at the valuation made, or to offer in writing a larger price therefor, or to show cause why the land should not be sold. At this meeting the appellant demanded that the one-forty-eighth portion of the total acreage of the land, being his share therein, should be alloted and set off to him. This demand was refused for a number of reasons stated by the master. One of these reasons and the only one that need be considered, since it alone is conclusive of the appellant's right, is that the demand was too late. The appellant had agreed with other parties in interest that a division into as many purparts as there were parties entitled could not be made. He had presented a plan of division into nine parts, and had testified and called witnesses in support of this plan. He had been present at all the subsequent meetings, nine in number, and had made no objection to the course that was being pursued and was now almost ended.

In the written argument presented it is argued that the appellant was not a party to the agreement reported by the master as having been made, and it is claimed that the agreement,

if made, was not binding because it was not reduced to writing. The accuracy of the master's report cannot be challenged in this way. We are without means to determine the facts since there is nothing on the record that throws light upon it, and we must consider the confirmation of the report by the court as conclusive of this question. A rule of the court provides that: "No agreement of attorneys touching the business of the court will be considered valid unless reduced to writing." This rule does not apply to such an agreement. The object of the rule is to prevent unseemly controversies, and to relieve the court of the embarrassment of deciding questions growing out of a misunderstanding of counsel. It has no application to an agreement made in open court during the trial of a cause, nor to one on which the court at the time is asked by the parties to act. In effect this is what this agreement was. It was made in the presence of the master and with the intent that he should act upon it in conducting the proceedings.

The questions of practice before the master which have been presented do not require consideration. That relating to the manner in which the bidding should be conducted is apparently an afterthought, as it is not raised by the exceptions to the master's report nor by the assignments of error to the order of the court. That to the right to vacate an allotment on the failure of a bidder to enter security does not concern the appellant, as he was not prejudiced by the master's action in the matter. We find nothing on the record that would warrant the sustaining of any of the exceptions, and the decree is affirmed at the cost of the appellant.

Lehigh Valley Coal Company *v.* Everhart, Appellant.

Mines and mining—Lease—Royalties.

A mining lease gave to the lessee the right to mine all the merchantable coal to exhaustion, accompanied with certain surface and timber privileges on the lessor's land. No fixed term was specified. One clause of the lease provided for the payment of thirty cents per ton for the coal mined and removed. By a subsequent clause the same rate per ton was fixed, but the lessee agreed to pay during the remainder of the term "a fixed

minimum cash royalty annually of thirty thousand dollars in quarterly installments, and for such payment may mine and remove in each and every year as aforesaid one hundred thousand tons of coal." *Held*, that the lessee was bound to continue the payment of the stipulated minimum royalty as long as any coal remained unmined, although he may have paid an amount in excess of thirty cents per ton for all the coal under the land both mined and unmined. In such a case the lessee's loss was caused by his own delay. Lehigh & Wilkes-Barre Coal Co. v. Wright, 177 Pa. 387, followed.

Equity—Equity practice—Findings of fact and conclusions of law.

Where counsel present requests for findings of fact and for conclusions of law, the judge is bound to answer each by adopting, affirming, qualifying or denying it. It is not sufficient that such requests may be substantially answered by the judge's own independent findings, if he does not indicate in connection with each request itself what he regards as his answer, to be found in his own independent findings.

Mr. Justice Potter dissents.

Argued March 25, 1903. Appeal, No. 328, Jan. T., 1902, by defendants, from decree of C. P. No. 4, Phila. Co., Dec. T., 1901, No. 2684, on bill in equity in case of Lehigh Valley Coal Company v. George W. Everhart. Before Mitchell, Fell, Brown, Mestrezat and Potter, JJ. Reversed.

Bill in equity for an injunction.

The opinion of the Supreme Court states the case.

Error assigned was in not dismissing the bill.

George R. Bedford and *Richard C. Dale*, with them *Henry A. Fuller*, for appellants.—The plaintiff is expressly obligated to pay the minimum until all the merchantable coal shall be mined out and exhausted: Wright v. Warrior Run Coal Co., 182 Pa. 514; Axford v. Thomas, 160 Pa. 8.

The contract is properly construed as a lease and not as a sale: Denniston v. Haddock, 200 Pa. 426.

The contract, however, construed as a sale, leads to the same conclusion: Woodward v. D., L. & W. R. R. Co., 121 Pa. 344; Timlin v. Brown, 158 Pa. 606; Lehigh, etc., Coal Co. v. Wright, 177 Pa. 387.

John G. Johnson and *S. P. Wolverton*, with them *Francis I. Gowen*, for appellee, cited: Boyer v. Fulmer, 176 Pa. 282;

Sanderson v. Scranton, 105 Pa. 469; Del. & Hudson Canal Co. v. Hughes, 183 Pa. 66; Lillibridge v. Lackawanna Coal Co., 143 Pa. 293.

Opinion by Mr. Justice Mestrezat, May 11, 1903:

By a contract in writing, dated January 1, 1884, the plaintiff and defendants' predecessor in title, each being the owner of the undivided one half of the premises, for the consideration of the rents therein named and the covenants to be performed by the lessee, "demised, leased and to mine let" to one Frederick Mercur "all the anthracite coal" in and under a certain tract of land lying in Luzerne and Lackawanna counties, together with the use of such portion of the surface as might be required for mining improvements necessary for the development of the mining operation; and also with the right to cut and use timber on lessors' land for mining purposes during the term of the lease. The contract provided that the lessee should "have and hold the said coal and mining privileges with the surface rights . . . . until all the merchantable coal which can be mined and removed by proper, skilful and workmanlike mining shall be mined out and exhausted."

The lessee covenanted, inter alia, as follows: That he would forthwith enter into possession of the demised premises and proceed with due diligence to mine and remove all the merchantable coal; that he would pay quarterly a royalty of thirty cents per ton for each ton of coal mined and shipped which should pass over a screen of five eighths inch square mesh, and for all coal which should pass through a screen of five eighths inch square mesh, a royalty proportioned to the prices of the larger sizes; that after the first year, he would pay "a fixed minimum cash royalty annually of thirty thousand dollars in quarterly instalments as aforesaid and for such payment may mine and remove in each and every year as aforesaid one hundred thousand tons of coal of the sizes larger than pea coal . . . . And if in any one year the stipulated minimum cash royalty shall be paid and sufficient coal at the royalty aforesaid to equal such minimum shall not have been mined out and removed, the deficit may be mined out and removed, without charge, in any subse-

quent year of the term." The contract provided that the payment of the royalty should be suspended if the machinery should be broken or injured and for certain other enumerated causes. The ninth paragraph is, inter alia, as follows: "That if at any time any installment of rent or any part thereof shall remain unpaid for the period of sixty days . . . . the said lessors may at their option declare this lease at an end, and thereupon all rights of the said lessee under this instrument shall absolutely cease and determine . . . . and in case a cause of forfeiture shall arise . . . . and shall . . . . be waived, the right of forfeiture shall remain and be in force whenever and so often as a new cause of forfeiture by reasons of nonpayment of rent or otherwise shall arise." It was further stipulated in the same paragraph that "to the end that a speedy process may be had for the recovery and the resumption of the possession of the demised premises after forfeiture declared," the lessors might, by a power of attorney therein given, enter judgment in any action of ejectment brought to recover the premises upon which judgment a writ of habere facias possessionem might issue forthwith and the premises with all the improvements thereon be delivered at once to the lessors.

For a nominal consideration, Mercur, the lessee, on March 29, 1884, sold and assigned all his interest in the lease to the Lehigh Valley Coal Company, the plaintiff in this suit. No mining operations were begun on the property until November, 1890, but in the meantime, the coal company paid the stipulated annual royalties.

This bill was filed January 16, 1902, and it avers, inter alia, that up to October 1, 1901, the plaintiff had paid to defendants the full amount of the royalties due them under the terms of the contract for all the coal in and under the land described therein, and that they were not entitled to any further payments or royalties under or by virtue of the terms of the agreement. The bill prayed that it be decreed that the plaintiff has paid the full amount of royalty that it is required to pay by virtue of the lease and is entitled to possession of the demised premises without further payments until it shall have mined and removed the remainder of the coal in and under the premises. A further prayer of the bill was that defendants be enjoined "from declaring the terms of the said mining lease at an end and from

resuming possession summarily of the said premises," and from interfering with plaintiff's possession thereof until it shall have mined and removed the remainder of the coal in and under the demised premises. The answer denied that the coal remaining in the land had been paid for and also denied that the plaintiff had observed its covenants, and averred a breach of the same in that it had not paid the minimum amount of royalties payable on January 20, 1902.

The learned trial judge found that the payments made to the defendants up to October 1, 1901, were in excess of the value of their share of the coal mined and removed according to the method of valuation provided by the lease, and was, by the same method of calculation, also in excess of the sum due the defendants for the coal mined and yet to be mined on the premises. He held "that the plaintiff is entitled to mine and remove, within a reasonable time, the unmined portion of the moiety of the coal demised in the indenture mentioned in the bill, for which it has made payment, without the payment of any further royalty, minimum or consideration therefor," and enjoined the defendants "during said reasonable time" from declaring "the term of the said indenture at an end," and from resuming possession of the coal or from interfering with the plaintiff company's possession of the same until it shall have mined and removed the coal.

The right of the plaintiff to the relief sought in the bill depends upon the construction of the contract made on January 1, 1884. The intention of the parties must be ascertained from their contract, and when thus ascertained, it must be carried out regardless of any supposed hardship that may result to either of the parties. When the terms of an instrument are plain and easy of interpretation, there is no necessity for invoking the aid of technical rules of construction to determine the intention of the parties. This frequently leads to the making of another and different contract by the court, and not to the enforcement of the contract of the parties which is the duty of that tribunal. Here, we are not concerned with what the parties should have done, what stipulation they should have inserted in their contract, but our sole duty is to compel them to observe and carry out what they did as evidenced by the instrument in writing which bears their signatures. If

either of the parties made a "hard and unconscionable bargain," it is his act, and in the absence of fraud, accident or mistake, he cannot invoke the aid of a court to relieve him from his folly. Such errors have not yet been recognized or regarded as being within the corrective powers of either the legal or chancery side of our courts of justice, and until the authority is conferred or declared to exist, we must decline to exercise it.

By the terms of this agreement, the lessee became entitled to all the merchantable coal within the described premises, together with the use of such portion of the lessors' surface as might be required for airshafts and other mining improvements, and also with the right to cut and use timber on the lessors' lands for mining purposes during the existence of the lease. The coal was not to remain in place, but was to be mined and removed with due diligence by the lessee. No definite time was fixed within which the coal was to be removed, but it was expressly provided that the lessee was to have and to hold the coal and mining privileges with the surface rights and timber privileges "until all the merchantable coal which can be mined and removed by proper, skilful and workmanlike mining shall be mined out and exhausted." This stipulation defined or fixed the term, though it was indefinite, in which the lessee should remove the coal and exercise the rights conferred on him by the contract. It is, therefore, clear that the intention of the parties as expressed in their contract was that all the coal was leased or granted to the lessee, but that he should proceed with due diligence to mine and remove it until it was "mined out and exhausted." Practically and in effect what the lessee got by the contract was the right to mine all the merchantable coal to exhaustion, accompanied with certain surface and timber privileges on the lessors' land.

The payment of thirty cents per ton for the coal mined and removed, as provided in the second paragraph of the lease, was not the only consideration or compensation for the rights and privileges granted or leased to the lessee. Had it been, the additional provision for the payment of royalty contained in the third paragraph would have been surplusage and entirely unnecessary. We must presume that the parties had some purpose in view when they inserted the minimum clause in the

agreement. It must be read in connection with, and as part of, the provision for the payment of royalty in the second paragraph. By the terms of this paragraph, the lessee covenants to pay thirty cents per ton for each ton mined and shipped; by the third paragraph, the same rate per ton is fixed, but he agrees to pay during the remainder of the term "a fixed minimum cash royalty annually of thirty thousand dollars in quarterly installments, and for such payment may mine and remove in each and every year as aforesaid one hundred thousand tons of coal." The provisions of the two paragraphs do not conflict and both are operative and must be given effect. The rate of thirty cents named in the second paragraph was fixed in view of, and was controlled by, the fact that the lessee would "proceed and continue with due diligence to mine out and remove" the coal, thereby enabling the lessors to realize promptly upon it. The speedy mining of the coal and the consequent early receipt of the royalties or rentals therefor was doubtless an important consideration with the lessors in fixing the rate established in this paragraph of the lease. They realized, however, that under this clause of the contract they had no protection against delay in the mining operations and that there was no provision for compensating them for the loss they would sustain should the lessee fail to mine the coal promptly. The parties, therefore, fixed another rate or consideration for the coal predicated on the action of the lessee in delaying the payment of the rentals and thereby prolonging the use and control of the surface rights and timber privileges consequent thereon. Hence followed the third paragraph which is an absolute and positive covenant that the lessee shall pay to the lessors $30,000 annually during the remainder of the term. The term is fixed, and continues from the date the lessee begins the operation of mining, immediately after the execution of the agreement "until all the merchantable coal which can be mined and removed by proper, skilful and workmanlike mining shall be mined and exhausted." For the payment of the minimum cash royalty he may mine and remove 100,000 tons of coal. This is at the rate fixed in the second paragraph of the contract. He is also required to pay at the same rate per ton for any coal mined in excess of the amount he is permitted to mine in consideration of the quarterly minimum; and he may, at a like rate without charge,

make up in any subsequent year of the term the deficit in the amount mined in any preceding year. If the lessee had mined and removed the coal with due diligence, thirty cents per ton would have been the full compensation he would have been required to pay for the rights and privileges granted him; as in that event, he would have mined in excess of the minimum quantity in each year until the coal had been exhausted and the term had, thereby, ended. But having failed to conduct his mining operations with the promptness required by the contract, the lessee subjected himself to the other or alternative mode of compensation provided in the third paragraph of the lease.

It is contended by the learned counsel for the appellee that by this contract a fee simple estate in the coal was conveyed to and vested in the lessee. But if this be conceded, it does not follow that the consideration named in the agreement shall not be paid by him. As we have attempted to show, the consideration was fixed by the parties and was not payable in a lump sum, but in annual installments of not less than $30,000 per year until the coal was mined out and exhausted. This is the positive stipulation of the contract and is not affected by the title or interest which the lessee takes to or in the coal.

The appellee urges that if it is compelled to continue the payment of the stipulated minimum royalty, it will be in direct opposition to the provision of the lease that the deficit may be mined out and removed "without charge." This is clearly erroneous and is not supported by the terms of the lease. The third paragraph, wherein this clause occurs, provides that if in any one year there shall not be sufficient coal mined to equal the minimum royalty, "the deficit may be mined out and removed, without charge, in any subsequent year of the term." The appellee, therefore, is not entitled to the benefit of this provision of the lease to make up a deficit "without charge" unless it mines the coal during the continuance of the term. This it can do by complying with the terms of the contract and thus preventing a forfeiture of the lease.

The appellee also insists that the lessors' construction of the lease will do it great injustice and require it to pay far in excess of the royalties reserved in the lease. In reply to this proposition it may be said that the parties must abide by the

contract they made whatever it may be, and that if the rent or royalty paid by the lessee is in excess of thirty cents per ton, it is solely the fault of the lessee and is strictly within the terms of the agreement. If the coal had been promptly mined and the lessors had been paid the rent promptly as required by the contract, they could have used the proceeds of the coal advantageously and thus realized on what they were entitled to have under the second paragraph of their agreement. Not only has the delay in mining the coal been detrimental to the interests of the lessors, but to permit the lessee to continue in possession of the demised premises without payment of the minimum royalty during the term, would allow it to use the surface rights and timber privileges granted in the lease without any compensation whatever. This was not contemplated by the parties under any reasonable interpretation which may be given the contract.

The prayer of the bill recognized the fact that the contract defines the term in which the coal is to be mined and removed and that the term is still in existence. It asks the court to enjoin the defendants "from declaring the term of the said mining lease at an end." The decree itself gives to the agreement a like construction by enjoining the defendants "from declaring the term of the said indenture at an end." If the term is still in existence, the lessors have a right to the payment of the minimum cash royalty, as by the third paragraph of the lease the royalty was to be paid "for the remainder of the term." The failure to pay it would result in a forfeiture of the lease, and that is the only way in which the term could be terminated, save by the exhaustion of the coal. The decree, therefore, upon its face is bad and is in direct contravention of the express terms of the contract made by the parties. It is further violative of the contract in that it permits and authorizes the lessee to mine and remove the unmined portion of the coal "within a reasonable time" without the payment of the stipulated annual royalties. The provisions of the contract not only forbid this, but make such action on the part of the lessee a cause of forfeiture. The effect of the decree, therefore, is to set aside the lease and replace it with an agreement whose terms are in direct opposition to it.

We are clearly of opinion that the case at bar cannot be dis-

tinguished from that of the Lehigh & Wilkes-Barre Coal Co. v. Wright, 177 Pa. 387. The covenants and stipulations in the contracts in the two cases, while differing in phraseology, are in effect the same. "Royalty" and "rent" are used interchangeably in both contracts. In the contract in each case, a fixed sum is to be paid annually in quarterly installments. In this case, it was covenanted that the lessee "for the remainder of the term will pay a fixed minimum cash royalty annually." In the Wright case, it is provided that the lessee "whether coal be mined or not shall pay . . . . an annual minimum rental." The phraseology of the two contracts is different, but the language employed in both cases requires the lessee to pay annually a fixed royalty or rental, in default of which the lease may at the option of the lessor be forfeited. This is the only fair and reasonable interpretation of which the language in the two contracts is susceptible.

The learned trial judge misconstrued rule 62 of the equity rules adopted by this court as to his duty in answering the requests for findings of fact and conclusions of law. The judge, sitting as a chancellor, "may adopt or affirm these requests, or any of them, or state his findings of fact or of law in his own language," but this language of the rule applies to each request, and it is the duty of the judge to make a separate and distinct answer to each request as directed by the rule. It is but fair to the trial judge to say that the opinion in this case was filed by him before the decision of Hoyt v. Kingston Coal Co., 203 Pa. 509, in which our Brother Brown, speaking for the court, considers the rule in question and interprets it as suggested above.

We are of opinion that under a proper interpretation of the contract between the parties, the defendants have a right to insist on the payment of the fixed minimum royalty as provided in the lease, and that if the plaintiff fails to make such payment, the defendants may forfeit the contract.

The decree of the court below is reversed and it is now ordered, adjudged and decreed that the bill be dismissed at the cost of the plaintiff.

Mr. Justice Potter, dissenting:

I dissent from this judgment for the reason that I regard the

contract as a sale of the coal in place, to be paid for by the ton, the stipulated annual payment being not as rental, but as so much of the purchase money for the coal. In no event can I see any justification for requiring payment for any more coal than is in existence upon the tract. The full amount of coal in the entire tract has already been paid for at the agreed rate.

The effect of this decision will be to compel the purchaser to pay twice for the same property. Such a result could never have been contemplated by the parties to the contract.

Naulty, Appellant, *v.* Bulletin Company.

Libel—Innuendo—Province of court and jury.

The purpose of an innuendo is to define the defamatory meaning which the plaintiff attaches to the words ; to show how they come to have that meaning and how they relate to the plaintiff. But it cannot be used to introduce new matter, or to enlarge the natural meaning of the words, and thereby give to the language a construction which it will not bear.

It is the duty of the court in all cases to determine whether the language used in the objectionable article could fairly and reasonably be construed to have the meaning imputed in the innuendo. If the words are not susceptible of the meaning ascribed to them by the plaintiff and do not sustain the innuendo, the case should not be sent to a jury.

Argued March 26, 1903. Appeal, No. 57, Jan. T., 1903, by plaintiff, from judgment of C. P. No. 1, Phila. Co., March T., 1901, No. 2892, on demurrer to statement in case of Edwin F. Naulty v. Bulletin Company. Before MITCHELL, FELL, BROWN, MESTREZAT and POTTER, JJ. Affirmed.

Trespass for libel.

The material portion of the plaintiff's statement was as follows :

And the plaintiff further saith that the Bulletin Company, a corporation conducting and publishing a newspaper called "The Evening Bulletin," in the city of Philadelphia, well knowing the premises, and intending to injure plaintiff and to deprive him of his good name, and further intending to cause plaintiff to lose and to be hurt in his chosen occupation as an expert in

historical matters and a promoter and manager of historical and patriotic projects, did falsely, maliciously, wickedly, and illegally make and publish of and concerning plaintiff and of and concerning plaintiff as an expert in historical matters and a promoter and manager of historical and patriotic projects as aforesaid, the following false, scandalous, illegal, defamatory and malicious writing and libel in substance as follows:

VICE-PRESIDENTS ARE WANTED.

Philadelphian Says Harewood was built by Washington and Recites "Historical Facts" Which Are Not So.

SEVERAL DISTINGUISHED MEN ACCEPT.

Washington, May 16.

A distinguished gentleman in Washington, including senators, representatives, army and navy officers and others, have within the past few days received invitations to become vice-presidents of an association formed for the purchase and preservation of an alleged manor house, Harewood, said to have been built and occupied by George Washington. Genuine surprise has been caused by the receipt of these invitations, as there is high authority for the statement that Harewood, as far as George Washington's connection with it is concerned, is a castle in the air. The invitation is in the form of the following letter from the office of the secretary of the association, Edwin Fairfax Naulty, 112 S. 4th St. Philadelphia:

"Esteemed Sir: A number of gentlemen of Pennsylvania and the Virginias have banded together and formed the Washington Manor Association for the purchase and preservation of Harewood, the ancient manor house built by General Washington in 1752–56, near Charlestown, in what is now Jefferson county, West Virginia, but what was then Berkely county, Virginia. An option on the estate has been obtained from Mr. John Augustine Washington, its present owner, and a charter for the organization has been applied for. It is our purpose to raise the necessary money for the purchase of the historic old place by popular subscription, and to preserve Harewood forever for the American people as is Mount Vernon.

"It is our intention to have our Vice-Presidential Board composed of at least twenty of the most representative-men in the United States, chosen from every representative calling,

and we should like to add your name to the board. Among those who have already accepted are: General Miles, Admiral Dewey, President Eliot, of Harvard; General Joseph Wheeler, Dr. Marcus Benjamin, of the Smithsonian Institute, and General Joseph Breckinridge, Inspector-General, U. S. A. Invitations have also been sent to Chief Justice Fuller, United States Supreme Court; President Hadley, of Yale; Bishop Potter, Bishop Coleman, of Delaware; Senators Lodge, of Massachusetts; Daniel, of Virginia; Scott, of West Virginia; Penrose, of Pennsylvania; Depew, of New York; Dolliver, of Iowa, and Fairbanks, of Indiana; the Hon. Seth Low, the Hon. W. C. Whitney and others.

"Permit me to recall to your memory some of the historical associations of Harewood. It was built in 1752–56 by General Washington, and was afterward occupied by his brother, Colonel Samuel Washington. It has been in the possession of the family ever since, and is now owned by Mr. John Augustine Washington. Around its gray old walls cling some of the most romantic memories of the Colonies, Revolutionary and early Federal periods. In its great parlor James and Dolly Madison were wed, having journeyed thither from Philadelphia in Thomas Jefferson's coach for the purpose. Its roof sheltered Louis Philippe, afterward King of France, and his two brothers during their exile.

"There the young son of Lafayette found asylum during the French Revolution. Chief Justice Marshall compiled there part of the 'Life of Washington,' and Sparks part of his 'Letters of Washington.' Its halls have echoed to the tread of many a famous beauty and gallant gentleman of the olden time.

"In the parlor still stands the great black marble fireplace given by Lafayette to Washington, and placed by him at Harewood. Martha Washington planted the box hedge now growing in the garden, and Dolly Madison the famous row of lilacs which crowns the lower terrace of that bower of beauty. Thomas Jefferson said of the view from its upper windows, looking east toward Harper's Ferry, and the Blue Ridge, that 'it was worth crossing the Atlantic to see.'

"Of the 2,000 acres of land comprising the estate in General Washington's day, only 263 are now left, but these comprise

the heart of the place. Mr. Washington, the present owner, has agreed to sell the place for $500 an acre, manor house, offices, barns and outbuildings all included. The Washington Manor Association proposes to raise the money by subscriptions of $1 each, and the issuance of certificates, and we hope to accomplish this within less than two years.

"Confident that you will join our Board of Vice-Presidents, and aid us in this splendid work, I am, dear sir, yours sincerely,

"EDWIN FAIRFAX NAULTY,
"Secretary."

Several of the gentlemen who received this invitation courteously accepted it without refreshing their memory or making inquiries, and are now being advertised as vice president of the Washington Manor Association. Others more familiar with the Washingtons studied up the biographies and investigated the records in the Congressional Library, the State Department and elsewhere, and are now prepared to say that there is no justification for the existence of this association, because they say Washington never built the alleged Manor House and that no such place as Harewood has any association with the life of Washington.

Moreover, the historians say that President Madison was not married at Harewood, but in a house in Frederick county belonging to Steptoe Washington. George Washington did own land in West Virginia, which he acquired when a young surveyor, but he sold it to his brothers, Charles and Samuel, and never built a house there. He inherited Mount Vernon in 1775 when a young man, and never lived elsewhere except in an official residence.

In view of these circumstances, and especially in view of the statement in Secretary Naulty's letter that $500 an acre is to be paid for the Harewood property, some of the distinguished gentlemen who have been invited to become vice presidents of the Washington Manor Association have declined in writing and are inclined to the opinion that this well-meaning society have either been made the unwitting victims of real estate speculators or of their too eager patriotism.

That said libel was published in the Evening Bulletin on Thursday, May 16, 1901.

Plaintiff further saith that the matter contained in the headings to said publication, "Philadelphian says Harewood was built by Washington and recites historical facts which are not so" (meaning by "Philadelphian" this plaintiff). The reference in said libel to the property, as "an alleged manor house Harewood, said to have been built and occupied by George Washington." The statement therein, "That Harewood, as far as George Washington's connection with it is concerned, is a castle in the air." The statements following the copy of a letter signed by this plaintiff in said publication, all convey the innuendo and mean, and are meant to mean, that this plaintiff is not qualified in his chosen occupation as an expert in historical matters and a promoter and manager of historical and patriotic projects, and that in sending out the letter quoted in said libel and in promoting and acting as secretary of the Washington Manor Association therein referred to, he is guilty of a fraud and deception on the public and is engaged in obtaining money from the public under false pretenses.

And the plaintiff further saith that the charges in said publication and the innuendoes conveyed thereby against him are all false. That each, every and all of the historical facts contained in the letter signed by this plaintiff as to the property called Harewood and quoted in said publication are historically true.

And the plaintiff further saith that said the Bulletin Company well knew said charges and the innuendoes contained in said libel against this plaintiff to be untrue when made by it.

Plaintiff further saith that he had made extensive arrangements to lecture on the subject of the project known as the Washington Manor Association for the preservation of Harewood, referred to in said publication, from which both he individually and the said association would have derived large financial profits. That said publication and the libelous statements contained therein has and will materially injure and deprive said plaintiff of this source of income and profit.

And the plaintiff further saith that said publication is a false and malicious libel. Plaintiff denies the truth of all charges and innuendoes so injuriously made against him in said publi cation.

By reason of this libel plaintiff has been brought into re-

proach, said charges have been widely published and plaintiff has suffered in character and in feelings to an amount which exceeds $10,000, wherefore he brings suit.

The court sustained a demurrer to the statement.

Error assigned was the judgment of the court.

William MacLean, Jr., for appellant.—The article as interpreted by the plaintiff was injurious to him in his profession and charged him with a criminal offense. It was therefore libelous per se. The plaintiff was entitled to go to the jury on the question of general damages: Meas v. Johnson, 185 Pa. 12; Evans v. Tibbins, 2 Grant, 451; Wildee v. McKee, 111 Pa. 335; Price v. Conway, 134 Pa. 340; Collins v. Dispatch Pub. Co., 152 Pa. 187; McIntyre v. Weinert 195 Pa. 52; Press Co. v. Stewart, 119 Pa. 584.

R. Stuart Smith, with him *Charles E. Morgan, Jr.*, for appellee. —The innuendoes contained in the plaintiff's statement of claim alter the natural and obvious meaning of the words published by the defendant. It is the province of the court to determine whether the words are capable of the meaning attributed to them, and the judgment entered for the defendant on the demurrer should be affirmed: Shaffer v. Kintzer, 1 Binney, 537; Gosling v. Morgan, 32 Pa. 273; Stitzell v. Reynolds, 59 Pa. 488; Pittsburg, etc., Pass. Railway Co. v. McCurdy, 114 Pa. 554; Com. v. Chambers, 39 Legal Int. 208; Hackett v. Pub. Co., 18 Rhode Island, 589 (29 Atl. Repr. 143): McGraw v. Press Co. 85 Michigan, 203 (48 N. W. Repr. 400); Wing v. Wing, 66 Maine, 62; Hunt v. Goodlake, 29 Law Times Rep. 472.

Opinion by Mr. Justice Mestrezat, May 11, 1903:

Little need be said to sustain the judgment of the trial court. We cannot agree with the learned counsel for the appellant that the innuendoes set out in the statement are supported by the language used in the publication complained of. No fair or reasonable construction of the words in the objectionable article will warrant the innuendo, laid in the statement, "that this plaintiff is not qualified in his chosen occupation as an

expert in historical matters and a promoter and manager of historical and patriotic projects, and that in sending out the letter quoted in said libel and in promoting and acting as secretary of the Washington Manor Association therein referred to, he was guilty of a fraud and deception on the public and is engaged in obtaining money from the public under false pretenses." The tenor and effect of the article published by the defendant company was simply to deny the correctness of certain alleged historical facts set forth in the circular letter written by the plaintiff as secretary of the association. It did not impugn the motives or good faith of the writer in any way, nor by any fair intendment could it be interpreted as meaning that the "plaintiff is not qualified in his chosen occupation as an expert in historical matters and a promoter and manager of historical and patriotic projects."

The purpose of an innuendo, as is well understood, is to define the defamatory meaning which the plaintiff attaches to the words; to show how they come to have that meaning and how they relate to the plaintiff: Price v. Conway, 134 Pa. 340. But it cannot be used to introduce new matter, or to enlarge the natural meaning of the words, and thereby give to the language a construction which it will not bear: Hackett v. Providence Telegram Publishing Co., 18 R. I. 589. It is the duty of the court in all cases to determine whether the language used in the objectionable article could fairly and reasonably be construed to have the meaning imputed in the innuendo. If the words are not susceptible of the meaning ascribed to them by the plaintiff and do not sustain the innuendo, the case should not be sent to a jury. The learned trial judge sustained the demurrer in this case, and we are of opinion that he committed no error.

The judgment is affirmed.

Glenn *v.* Philadelphia and West Chester Traction Company, Appellant.

Evidence—Witness—Cross-examination.

The cross-examination of a witness should be confined to matters in regard to which he has been interrogated in chief, or to such questions as may tend to show his bias, interest or relation to the party calling him, or test his knowledge, integrity and accuracy of statement. A party should not be permitted to establish his claim or to prove his defense by a cross-examination of the witnesses of his opponent. Such is not the purpose for which a witness is cross-examined. While this is the rule, yet the range of a cross-examination, to a very great extent, must be left to the sound discretion of the trial judge, and unless that discretion has been plainly abused, to the injury of the party complaining, it is not ground for reversal.

If part of a conversation be given in chief the rest of it may be elicited on cross-examination.

Where a witness has stated a fact he may be asked by the other party to detail all the circumstances within his knowledge which qualify it even though they may constitute new matter and form a part of his own case.

In an action by a woman against a street railway company to recover damages for personal injuries, a physician called by the defendant testified that he had concealed from the plaintiff while he was treating her professionally, and, as she thought, as her own physician, the fact that he was surgeon of the company, in order that he might secure information which would place him in a position "to be ready for anything that might come in the future." Subsequently plaintiff came to the physician at his request, and he testified that he told her that he thought he could get some compensation for her from the company. He was then asked on cross-examination if in that conversation he did not deny to plaintiff that he was the surgeon of the company. *Held*, that the cross-examination was proper, as it elicited the balance of the conversation, part of which the witness had given, and also tended to impeach his credibility.

Injuries—Street railways—Damages—Wages.

In an action against a street railway company to recover damages for personal injuries, where the plaintiff states the amount of her wages at the time of the accident, and that she was obliged to "lay off" from her work for a certain number of weeks, it is not error for the court to instruct the jury that she could recover for wages lost.

Argued March 27, 1903. Appeal, No. 13, Jan. T., 1903, by defendant, from judgment of C. P. No. 1, Phila. Co., Dec. T., 1900, No. 492 on verdict for plaintiff in case of Julia R. Glenn v. Philadelphia and West Chester Traction Company. Before

MITCHELL, FELL, BROWN, MESTREZAT and POTTER, JJ. Affirmed.

Trespass to recover damages for personal injuries. Before BRÉGY, J.

At the trial it appeared that plaintiff was injured on the night of November 27, 1900, by falling off one of defendant's electric cars. Plaintiff testified that at the time of the accident she received $6.00 per week, and that she was laid off from her work by reason of her injuries for six or eight weeks.

The court charged in part as follows:

The pain and suffering ought to be considered and such a a lump sum as you think would be proper for the amount of pain and suffering that the person will undergo as a consequence of the injury should be added to any sum that you think is direct compensation for money paid out or wages lost,

Verdict for plaintiff for $4,700 upon which judgment was entered for $2,000, all above that amount having been remitted by plaintiff.

Errors assigned were (1–5) the rulings on evidence referred to in the opinion of the Supreme Court; (6–10) portions of charge, quoting them.

S. Davis Page, for appellant.—Whatever may be the latitude as to cross-examination in England, in America it is generally confined to matters stated or assumed in the examination in chief of the same witness: Taylor on Law of Evidence (8th Eng. ed.), sections 1432, 1435 & pages 1225, 1227; Phila., etc., R. R. Co. v. Stimpson, 39 U. S. 448; Stafford v. Fargo, 35 Ill. 481.

The test of whether a fact inquired of in cross-examination is collateral is this: Would the cross-examining party be entitled to prove it as a part of his case, tending to establish his plea? Hildeburn v. Curran, 65 Pa. 59; Spenceley v. De Willott, 7 East. 108; Lawrence v. Barker, 5 Wendell, 301; Ellmaker v. Buckley, 16 S. & R. 72; Floyd v. Bovard, 6 W. & S. 65; Elliott v. Boyles, 31 Pa. 65.

A witness cannot be cross-examined as to any fact which

is collateral or irrelevant to the issue, merely for the purpose of contradicting him by other evidence, if he denies it: Ware v. Ware, 8 Maine, 42; Beak v. Hood, 185 Pa. 32; Cameron v. Montgemery, 13 S. & R. 128; Ott v. Houghton, 30 Pa. 451; Batdorff v. Farmers' Nat. Bank, 61 Pa. 179; Com. v. Mosier, 135 Pa. 221; Fitzpatrick v. Riley, 163 Pa. 65.

L. L. Smith, for appellee.—It is elementary law that if part of a conversation is given, the other side is entitled to the whole of it: Walsh v. Porterfield, 87 Pa. 376; Steckel et al. v. Desh, 2 Penny. 303.

And, of course, any question on cross-examination going to show the capacity, intelligence or bias of the witness is proper: Huoncker v. Merkey, 102 Pa. 462–467.

The test of what is collateral, as expressed in Hildeburn v. Curran, 65 Pa. 59, so much relied on by the appellant, is of very little service in the present class of cases, and is not generally accepted. 1 Greenleaf on Evidence (16th ed.), 461*f*, points this out clearly: Cameron v. Montgomery, 13 S. & R. 128; Gaines v. Com., 50 Pa. 319: Hester v. Com., 85 Pa. 139; Com. v. Goersen, 40 Legal Int. 484; Day v. Stickney, 96 Mass. 255; Martin v. Farnham, 25 N. H. 199; Phenix v. Castner, 108 Ill. 207; People v. Brooks, 131 N. Y. 321 (30 N. E. Repr. 189).

In Best on Evidence (Chamberlayne's ed.) p. 633 n., it is said that the veracity and bias of a witness are deemed relevant to the issue, and the answer of the witness involving these considerations may be contradicted.

Opinion by Mr. Justice Mestrezat, May 11, 1903:

It is well settled in this state that the cross-examination of a witness should be confined to matters in regard to which he had been interrogated in chief, or to such questions as may tend to show his bias, interest or relation to the party calling him, or test his knowledge, integrity and accuracy of statement. A party should not be permitted to establish his claim or to prove his defense by a cross-examination of the witnesses of his opponent. Such is not the purpose for which a witness is cross-examined. While this is the rule, yet the range of a cross-examination must, to a very great extent, be left to the sound discretion of the trial judge, and unless that discretion

has been plainly abused, to the injury of the party complaining, it is not ground for reversal: Bohan, v. Avoca Borough, 154 Pa. 404. If part of a conversation be given in chief, the rest of it may be elicited on cross-examination: West Branch Bank v. Donaldson, 6 Pa. 179; Stevenson v. Hoy, 43 Pa. 191. In Markley v. Swartzlander, 8 W. & S. 172, it was held, SERGEANT, J., that a party may cross-examine as to the res gestæ given in evidence, though it be new matter. And in Bank v. Fordyce, 9 Pa. 275, Chief Justice GIBSON said that a party is entitled to bring out every circumstance relating to a fact which an adverse witness is called to prove. In Jackson v. Litch, 62 Pa. 451, it is said that the authorities clearly establish that where a witness has stated a fact, he may be asked by the other party to detail all the circumstances within his knowledge which qualify it, even though they may constitute new matter and form a part of his own case. In that case, SHARSWOOD, J., speaking for the court, says: "I have not been able to find a single case in which this court has reversed on that ground (leading out new matter on cross-examination constituting the party's own defense)." After a review of the authorities, he continues: "It may be concluded from these authorities that in order to reverse, it must be an extreme case, in which discretion has been abused and in which it is apparent that the party has been injured." In Hughes v. Westmoreland Coal Co., 104 Pa. 207, TRUNKEY, J., delivering the opinion, says: "This court has rarely, if ever, reversed for an error in permitting a violation of the rules relating to cross-examination which do not result to the prejudice of a party."

The first, second and fourth assignments allege error in permitting certain questions to be asked the defendant's witness, Thomas, on cross-examination. The third assignment complains of the refusal of the court to strike out Thomas's answer to a question on cross-examination, and the fifth assignment alleges error in permitting the plaintiff, in rebuttal, to impeach the credibility of the witness, Thomas, by denying the truth of his statement on cross-examination. We are satisfied that the cross-examination of the witness was proper and that it would have been error to exclude it. Thomas was the surgeon of the defendant company, and the plaintiff was taken to his office shortly after she had received her injuries on the night of No-

vember 29, 1900, and he prescribed for her. He continued to treat her professionally for some time after the accident. On the trial of the cause, he was called as a witness by the defendant company. Having testified in chief that the plaintiff came to his office that night, that he inquired what the trouble was, that "she made no complaint of tenderness about the hip, in answer to questions of that kind she said there was no tenderness there," and that he had instructed her to go home and that he would see her in the morning, he was then asked on cross-examination, if the plaintiff did not tell him in that conversation "what sort of a fall she had." The witness had given a part of the conversation that occurred that evening in his office between him and his patient, and the cross-examination tended to disclose the other part of the conversation. This was clearly competent.

In April, 1901, after the plaintiff had instituted this action, she called on Dr. Thomas for the purpose of having an examination made preparatory to the trial of the cause. She told him the purpose of the examination, but he did not disclose to her that he was the surgeon of the company, of which fact she was ignorant. He at this time made a careful examination in order that, as he testifies, "I might be ready for anything that might come in the future." He says he withheld from the plaintiff the knowledge that he was the company's surgeon that he might make a settlement of the case. Subsequently to the examination and in response to his request, she came to see him, and he testifies that he then told her he thought he could get from the company compensation "for loss of time and that sort of thing." The plaintiff's counsel then asked him, if in that conversation he did not deny that he was the surgeon of the company, and that if the conversation, as narrated in the question, did not take place between them. This was admitted under objection by defendant, and he denied that the conversation had occurred. The question was then asked the plaintiff, and she contradicted the defendant and testified that the conversation did take place. There was no error in either of these rulings. The question was proper cross-examination, as it elicited the balance of a conversation, part of which the witness had given, and also tended to impeach his credibility. From his own testimony it appeared that he had concealed from the

plaintiff, while he was treating her professionally and, as she thought, as her own physician, that he was surgeon of the company, in order that he might secure information which would place him in a position "to be ready for anything that might come in the future." The cross-examination complained of was "directed to the situation of the witness, his relations with the party calling him, and his zeal or bias as shown by his conduct," and was, therefore, admissible: Bech v. Hood, 185 Pa. 32. Where the witness discredits himself in his examination in chief, a liberal cross-examination should be permitted which tends to attack his conduct and impeach his credibility. Thomas was a very important witness for the defendant. The question put to him on cross-examination tended to impeach his credibility and impartiality as to matters in this case, and his replies were, therefore, subject to contradiction.

The jury were not misled by the remarks of the trial judge, complained of in the ninth assignment of error. They merely elaborated what he had already said in his general charge on the subject, which it is alleged was erroneous. Nor is there any merit in the sixth, seventh and tenth assignments, in which exception is taken to certain portions of the charge. While the learned judge presented to the jury the supposed theories of both parties as to how the plaintiff was injured, he left it to them to say "how it did happen." It could not be presumed that the plaintiff was paid her wages when she was "laying off" but rather the contrary presumption would prevail. The testimony having fixed the wages the plaintiff was receiving at the time of the accident, the jury could properly be allowed to consider the loss she sustained by being deprived of them during her enforced idleness.

The judgment is affirmed.

Blauvelt *v.* Delaware, Lackawanna & Western Railroad Company, Appellant.

Negligence—Railroads—Grade crossing—"Stop, look and listen"—Evidence—Presumption.

In an action to recover damages for the death of a man killed while riding a horse over a grade crossing on a dark night, without any witnesses of the accident, the case is for the jury where the evidence for the plaintiff, although contradicted, tends to show that the night was so dark that the engine approaching the crossing running backward could not be seen; that it gave no warning by whistle or bell of its approach; that it carried no lights, that it could not be seen by a person approaching the crossing; and that it ran so noiselessly that it could not be heard by any one on the highway as he came to the crossing.

In such a case the presumption is that the deceased did his duty as he approached the crossing by stopping, looking and listening.

Negligence—Death—Parent and child—Adult son—Evidence.

In an action by a mother to recover damages for the death of her adult son, where the statement of claims shows the relation between the plaintiff and the deceased, the plaintiff may show what loss pecuniarily she had sustained in the death of her son.

Evidence—Computation—Jury.

Where there is data in evidence from which the jury may make a computation, it is not error to refuse to permit a witness to make the computation.

Evidence—Cross-examination—Contradiction of witness.

Where a witness has been cross-examined on matters material to the issue to which he testified in chief, his answers on cross-examination may be contradicted by other witnesses.

Argued April 15, 1903. Appeal, No. 297, Jan. T., 1902, by defendant, from judgment of C. P. Susquehanna Co., April T., 1900, No. 131, on verdict for plaintiff in case of Palmira Blauvelt v. Delaware, Lackawanna & Western Railroad Company. Before MITCHELL, DEAN, FELL, BROWN and MESTREZAT, JJ. Affirmed.

Trespass to recover damages for the death of the plaintiff's son. Before SEARLE, P. J.

At the trial it appeared that the deceased was a man thirty years old, and that he lived with his mother and helped to

support her. The statement of claim stated the relationship between the parties. The circumstances of the accident are set forth in the opinion of the Supreme Court.

When the plaintiff was on the stand the following offer was made:

Mr. Sherwood: We offer to prove as to this branch of the case, the services which the son performed for his mother at the time he was living there with her and up to the time of his death, and the different characters of the services, for the purpose of showing the amount of damages she has sustained by his death.

Mr. Warren: We object to it as incompetent. Objection overruled. Defendant excepts. Bill sealed for defendant. [19]

"A. Why, he done everything; cutting wood and working around and helping me around the house, and everything that he could do; going after the cow and feeding hogs, and everything when he was around the house, and taking care of the girl that is sick."

A witness of the defendant was asked as follows:

"Q. If a train were going twenty miles an hour, what would be the number of seconds that it would require to pass over the space from the whistling post at the south to this crossing?"

Objected, as a matter of mere computation.

The Court: It seems to me that is a question of mere computation.

Objection sustained. Defendants excepts. Bill sealed for defendant. [20]

"Q. Please tell us at what rate of speed—that is, how many feet per second—a train would go on the track at the rate of twenty miles per hour, and also at the rate of twenty-five miles per hour."

Objected to the same as before. Objection sustained. Defendant excepts. Bill sealed for defendant. [21]

Orland Taylor was asked as follows:

"Q. Did you have any conversation with him (Miller, the engineer) in which he said that the chimney of this light was smoked up and that he went out and wiped it off?"

Mr. Warren: We object that this is not a contradiction on material point nor as to the time of the accident, and that it is

incompetent and immaterial. Objection overruled. Defendant excepts. Bill sealed for defendant. [24]

Verdict and judgment for plaintiff for $1,900.

Errors assigned among others were (8) in refusing binding instructions for defendant; (19, 20, 21, 24) rulings on evidence, quoting the bill of exceptions.

Everett Warren, of *Willard, Warren & Knapp*, with him *A. H. McCollum* for appellant.—The case made by plaintiff consists of the evidence of about ten witnesses, of a negative character, and under the circumstances of little or no probative force. As compared with the whole evidence, there is at most not more than a scintilla of evidence to sustain the charge of negligence of defendant: Mellors v. Shaw, 1 Best & Smith (Q. B.,) 437 s. c. 101 E. C. L. Rep. 435; Ryder v. Wombwell, L. R. 4 Exchequer Cases, 32; Hyatt v. Johnston, 91 Pa. 196; Bank v. Wirebach's Exr., 106 Pa. 37.

The right of the mother to recover depended upon the family relation, and this was nothing more than filial duty and common humanity required of the son. It cost him nothing, and it cost plaintiff nothing either then or now. It is probably now done by one of the girls who can do it as readily as the son. It should have been excluded within the principles laid down: Zimmerman v. Zimmerman, 129 Pa. 229; Goodhart v. Penna. R. R. Co., 177 Pa. 1; Woeckner v. Erie Electric Motor Company, 182 Pa. 182.

Paul J. Sherwood, with him *Ralph B. Little*, for appellee.

Opinion by Mr. Justice Mestrezat, May 11, 1903:

This case was most carefully and patiently tried by the learned judge of the court below. It was submitted to the jury in a charge, impartial, exceptionally clear and exhaustive. The negligence of the defendant company and that of the deceased were the questions presented for the consideration of the jury and were determined in favor of the plaintiff. The defendant filed twenty-nine reasons for a new trial, all of which were carfeully considered and dismissed by the learned trial judge in an opinion which fully vindicates his conclusions. We now have this ap-

peal in which the learned counsel for the appellant company asks us to review practically the same questions determined against it on the motion for a new trial. Notwithstanding the twenty-nine assignments of error and the exhaustive argument in support of them, we are not convinced that the court below committed any reversible error in the trial of the cause.

The principal complaint of the defendant company is that the court erred in not affirming its first point that "upon the whole case the verdict must be for the defendant." Binding instructions in favor of the defendant would have been manifest error under the testimony in the case. John Blauvelt, the deceased, and his companion, each riding a horse, were struck and killed by a light passenger engine with tender, running backward on a descending grade, about 10:30 o'clock of a very dark night at a public crossing in the borough of La Plume, in Susquehanna county. No witness saw the men as they approached the crossing or at the time they met their death. The plaintiff contended and introduced evidence on the trial to show that the night was so dark that the engine approaching the crossing could not be seen; that it gave no warning by whistle or bell of its approach; that it carried no lights that could be seen by a person approaching the crossing; and that it ran so noiselessly that it could not be heard by any one on the highway as he came to the crossing. The defendant company claims that the evidence in support of these negligent acts was of a negative character and "of little or no probative effect" and should have been withdrawn from the jury. But this is clearly erroneous. An examination of the evidence satisfies us that it was ample, if believed, to sustain the plaintiff's contention, and, hence, it was the duty of the court below to submit it to the jury.

It is very strenuously urged by the appellant that Blauvelt's death was caused by his own negligence. It is conceded that in the absence of any evidence showing the contrary the presumption is that he did do his duty as he approached the crossing by stopping, looking and listening. But it is contended that the circumstances and facts attending the collision as disclosed by the evidence, clearly rebut the presumption that he did exercise proper care on the occasion, and that they show that by reason of intoxication or some other cause he disre

garded or neglected the duty required of him and thereby caused the collision which resulted in his death. It is claimed by the appellant that the road which Blauvelt traveled ran parallel with and near the defendant company's railroad and that after he left it and turned to cross the tracks of the railroad, his view in the direction in which the engine was coming was unobstructed for a long distance. It is also claimed that there were several lights on the engine and tender which he could have seen and presumably did see if he looked. In addition to these alleged facts, which it is claimed were sufficient warning to Blauvelt of the approach of the engine, it is further urged that had he exercised his sense of hearing as he was required to do, he must necessarily have heard the noise of the locomotive as it neared the crossing. These matters, it is argued, conclusively rebut the presumption that Blauvelt performed his duty to stop, look and listen as he approached the crossing. The difficulty with this contention is, however, that the plaintiff denies the existence of the alleged facts set up by the defendant company in support of its position. The evidence on the part of the plaintiff tends to show that there were no gates or guards at the place of the accident, that the engine approached the crossing noiselessly and without any lights on it or the tender that could be seen a sufficient distance to warn the deceased of its approach to the crossing. If these allegations were true, and the jury must have so found, there was nothing in the case to overcome the presumption that Blauvelt was in the exercise of due care at the time he was killed. Like the defendant's negligence, this was a question for the jury under the evidence and was submitted with proper instructions by the trial judge.

It was not error to permit the plaintiff, who was the mother of the deceased, to show what loss pecuniarily she had sustained in the death of her son. This was the effect of the testimony offered for the purpose, and the court charged that that would be the measure of damages. The assignments relating to the exclusion of the testimony offered to show facts ascertainable by mere computation cannot be sustained. The data which the witness had on which the computations were based were in evidence and the jury could make the calculations as well as the witness. Miller, a witness for the defendant company,

had testified in chief to matters material to the issue, and hence, his cross-examination relative thereto was proper. It was also competent for the plaintiff to contradict his answers.

We have not deemed it necessary to consider the numerous assignments of error seriatim. We are relieved from doing so by the full discussion of the case by the trial judge in his charge and opinion refusing a new trial. As correctly stated in the printed brief of the learned counsel for appellant, "in truth there is not much dispute over legal principles." The jury was the proper tribunal to determine the facts of the case, and having done so under proper instructions and with sufficient evidence to warrant the verdict, we must sustain the judgment entered by the court below.

The judgment is affirmed.

Kossouf, Appellant, v. Knarr.

Malicious prosecution—Arrest without information—Boroughs.

Where a burgess of his own motion and without complaint on oath or affirmation and not on view, issues a warrant for another person for violating a borough ordinance, and such person is arrested and imprisoned, the burgess is liable in nominal damages at least for false imprisonment.

Argued April 20, 1903. Appeal, No. 197, Jan. T., 1902, by plaintiff, from judgment of C. P. Clearfield Co., Sept. T., 1899, No. 366, on verdict for defendants in case of Joseph Kossouf v. Henry S. Knarr and George W. Hilliard. Before DEAN, FELL, BROWN, MESTREZAT and POTTER, JJ. Reversed.

Trespass to recover damages for false imprisonment. Before GORDON, P. J.

At the trial it appeared that the defendant Knarr, who was burgess of the borough of Du Bois, issued a warrant for the arrest of the plaintiff for erecting a building contrary to a borough ordinance. The warrant was issued without information, and not on view. The plaintiff was arrested and locked

up over night on his failure to pay the fine imposed upon him.

The court gave binding instructions for defendant.

Verdict and judgment for defendant. Plaintiff appealed.

Error assigned was in giving binding instructions for defendant.

Singleton Bell, for appellant.—In an action for damages for false imprisonment, probable cause is a matter of defense and must be affirmatively shown: Grohmann v. Kirschman, 168 Pa. 189; McCarthy v. DeArmit, 99 Pa. 63.

On principle, neither malice nor want of probable cause is an essential element in the constitution of an action for false imprisonment: McCarthy v. DeArmit, 99 Pa. 63; Neall v. Hart, 115 Pa. 347; Grohmann v. Kirschman, 168 Pa. 189.

The act of a judicial officer beyond his jurisdiction will render him liable in false imprisonment in the same manner as when he has no jurisdiction. In fact, the two things are exactly the same in principle and effect: Reid v. Wood, 2 Chester County Rep. 513; Gallitzin Borough v. Gains, 7 Kulp, 479.

The arrest was made upon a warrant which issued without the information which the law required to support it, and the burgess had no jurisdiction of the defendant: Borough of Plymouth v. Williams, 8 Kulp, 167; Pittston Borough v. Dymond, 7 Kulp, 431; West Pittson Borough v. Dymond, 8 Kulp, 12; Kessler v. Hoffman, 9 Pa. Dist. Rep. 365.

Under the facts here, the law specifically requiring a sworn information, and none ever being made, the burgess is liable in damages for false imprisonment: Kessler v. Hoffman, 9 Pa. Dist. Rep. 365; Tillman v. Beard (Mich.), 46 L. R. A. 215; Glazer v. Hubbard (Ky.), 39 L. R. A. 210; Leger v. Warren (Ohio), 51 L. R. A. 193; Truesdell v. Combs, 33 Ohio, 186.

A. L. Cole, for appellee, cited: McElhattan v. Kane, 7 Pa. C. C. Rep. 313; Neall v. Hart, 115 Pa. 347; McCarthy v. DeArmit, 99 Pa. 63.

Opinion by Mr. Justice Mestrezat, May 11, 1903:

There is but a single question in this case and that is whether

the learned trial judge erred in directing a verdict in favor of the defendant, Knarr. It is conceded that the evidence established no liability against Hilliard, the other defendant, and that the court below was right in directing a verdict for him. In July, 1899, Knarr was the burgess, and Hilliard the chief of police, of the borough of Du Bois, in Clearfield county. Kossouf, the plaintiff, contrary to the provisions of an ordinance, began the erection of a cased brick building in the borough. After some progress had been made, the burgess, on the evening of July 20, 1899, told Kossouf that the work must cease and the building must be torn down, which the latter agreed should be done. The next day the burgess was absent from the borough, and on his return in the evening, he was informed that Kossouf, notwithstanding his promise, was proceeding with the erection of the building. He, thereupon, and without any information having been made, issued a warrant for the arrest of Kossouf and delivered it to Hilliard, the policeman, who arrested Kossouf and took him before the burgess about ten o'clock of that evening. The burgess, without a hearing or trial, fined him $100, the amount fixed by the ordinance for its violation, and in default of payment committed him to the borough lockup, where he remained until eleven o'clock the following morning, when he was released.

These facts are not controverted and they clearly show a case of false imprisonment. The warrant was issued in violation of the constitutional provision that "no warrant . . . . to seize any person . . . . shall issue . . . . without probable cause, supported by oath or affirmation, subscribed to by the affiant." It was also in direct conflict with the provisions of the Act of June 4, 1897, P. L. 121, which provides the mode of procedure for the collection of fines and penalties imposed in pursuance of borough ordinances. It is there enacted that actions for fines or penalties may be commenced by warrant or summons before the burgess or a justice of the peace, but it is provided that "no warrant shall issue except upon complaint, on oath or affirmation, specifying the ordinance for the violation of which the same is issued." The right to arrest for the commission of a felony without information or warrant does not arise here. Nor was the plaintiff arrested on view, and hence, the subsequent provision of the statute relative thereto has no

bearing on the case. There can, therefore, be no question that the arrest was illegal and without authority of law and made the burgess liable to an action for false imprisonment.

The right to maintain the action against Knarr having been established, the plaintiff was entitled to at least nominal damages. The question of damages as against the single defendant was not raised or discussed on the trial of the cause and need not be here. It is sufficient to say that the motives of the defendant, probable cause and malice, may be shown in aggravation or mitigation of damages.

Hilliard, the policeman, can be eliminated from the case by a discontinuance or voluntary nonsuit, and the trial of the cause may then be proceeded with between the plaintiff and Knarr, the burgess, as defendant.

The judgment is reversed with a venire facias de novo.

Milliken's Estate.

Taxation—Collateral inheritance tax—Decedent's estates—Property in another state.

Where a man dies intestate and domiciled in another state, and leaves personal property, all of which is in the state of decedent's domicile, and two weeks afterwards his sister, who was domiciled in Pennsylvania and who was entitled to a share of his estate, also dies before actually receiving any of the estate, such share of the estate is liable for the payment of the collateral inheritance tax of the state of Pennsylvania.

In such a case the sister immediately upon the death of her brother was not only in constructive possession of her share of his estate, but she was to a degree in actual possession, inasmuch as she could exercise every right of an owner in actual possession, except that of determining the amount of charges for administration ; she was the absolute uncontrolled owner subject to a trifling lien.

Argued April 21, 1903. Appeal, No. 100, Jan. T., 1903, by Edward F. Milliken, from decree of O. C. Centre Co., No. 7252, on case stated in estate of Marion L. Milliken, deceased. Before Dean, Fell, Brown, Mestrezat and Potter, JJ. Affirmed.

Case stated to determine liability for collateral inheritance tax.

The facts are stated in the opinion of the Supreme Court.

The court in an opinion by LOVE, P. J., entered a decree in favor of the commonwealth for $5,412.22.

Error assigned was the decree of the court.

John Blanchard, with him *Andrew Shiland* and *Edmund Blanchard*, for appellant.

Harry Keller, for appellee, was not heard.

PER CURIAM, May 11, 1903:

James Milliken died February 4, 1902, intestate, unmarried and without issue; at his death his domicile was in the city of New York. He left a large personal estate consisting of stocks, bonds and cash which at his death was actually in New York, the place of his domicile. He left several collateral heirs among them a sister, this intestate, whose residence was in Bellefonte, Centre county, Pennsylvania; there descended to her at her brother's death one third of his estate, the net value of her share being $108,244.47; two weeks after his death, before any part of this had come into her actual possession, she on February 18, 1902, died intestate, unmarried and without issue. The question under the case stated is whether the sister's share of her brother's estate, his estate having been administered in New York, is subject to the collateral inheritance tax imposed by the laws of Pennsylvania.

Our act of May 6, 1887, enacts: "That all estates, real, personal and mixed of every kind whatsoever . . . . and all estates situate in another state, territory or county, when the persons dying seized thereof shall have their domicile within this commonwealth . . . . are hereby made subject to a tax of five dollars on every hundred dollars on the clear value of such estate."

The moment the brother died, the law cast upon the sister her share in his estate. It is wholly immaterial that the net amount was not yet fixed and could not be until the final settlement of the administration in New York; her right to the net amount was irrevocably fixed by his death. This is the sum of all the authorities. "An heir is one upon whom the law casts

an estate of inheritance immediately upon the death of the owner; and the rights of heirs are considered as arising at the moment of the death of the ancestor:" 2 Blackstone, 201; Williams on Executors, 404. It is true, at common-law, the word heir was strictly applicable only to one who succeeded to land, yet the right of possession in one entitled to personalty, devolving upon him by the death of the ancestor, had always been held to vest immediately on the death of the ancestor; and in the case of personal chattels the right draws to it the possession. As is said by SHARSWOOD, J., in Norris's Appeal, 64 Pa. 275, "Constructive possession, is adjudged to be in him in whom is the legal and rightful title." It is conceded that the legal and rightful title to her share was in Marion L. Milliken in Pennsylvania from the moment her brother died in New York. His securities were there deposited in a trust company; they were not in his physical possession; could not well have been; his right to custody over them to the extent of her share nominally passed at once to her on his death, subject only to the incident of administration in New York. Her share from that moment was a subject of bargain, sale or transfer by her in Pennsylvania, subject only to her share of the expenses of administration in New York. For two weeks then she was not only in full constructive possession, she was to a degree in actual possession, that is, she could exercise every right of an owner in actual possession except that of determining the amount of charges for administration; she was the absolute uncontrolled owner, subject to a trifling lien. Whatever may be the rule as to taxation of the personal estate of non-residents or as to the taxation of land outside the state, or of the taxation of personal property where there is no immediate right of possession, the tax here was imposed upon the property of a resident, the property which was immediately in her constructive possession and so remained until her death and, therefore, is clearly subject to the collateral inheritance tax imposed by our act of 1887. So the learned judge of the court below rightly decided. All the assignments of error are overruled and the judgment is affirmed.

Irvine, Appellant, *v.* Elliott.

Church law—Trial in church court—Reveiw—Conspiracy.

The civil courts will not review the proceedings of ecclesiastical courts on matters which come within the jurisdiction of the latter.

A priest of the Protestant Episcopal Church cannot hold the bishop of his diocese and a member of his congregation liable in damages in an action of trespass for an alleged wilful and malicious conspiracy, where the evidence shows that the defendants combined to make charges against the priest of conduct unbecoming a clergyman, and supported these charges with evidence in a trial in an ecclesiastical court, which resulted in the degradation of the priest from the ministry; and this is the case although the acts of the defendants may have to some extent been influenced by vindictiveness and hatred.

Argued April 21, 1903. Appeal, No. 20, Jan. T., 1903, by plaintiff, from judgment of C. P. Huntingdon Co., Sept. T., 1900, No. 17, on verdict for defendant in case of I. N. W. Irvine v. Emma D. Elliott, Ethelbert Talbot and Alexander Elliott. Before DEAN, FELL, BROWN, MESTREZAT and POTTER, JJ. Affirmed.

Trespass for alleged wilful and malicious conspiracy.

The facts are stated in the opinion of the Supreme Court.

Errors assigned were various portions of the charge and rulings on evidence.

Henry Budd and *Harry W. Petrikin* and *William H. Woods* for appellant.

C. M. Clement and *H. A. Fuller*, with them *H. H. Waite* and *R. A. Oribson*, for appellee.

PER CURIAM, May 11, 1903:

This appellant and plaintiff in the court below, I. N. W. Irvine, was a priest of the Protestant Episcopal Church and in April of 1898 was in charge of St. John's parish of Huntingdon, Pennsylvania. This was a very old established church of the Episcopal denomination, but at the date mentioned had become somewhat weak numerically and financially, consequently, un-

der the church rules, appellant was sent there first as a missionary but a year afterwards he resigned as missionary and thereupon the vestry elected him rector, relinquishing further aid as a mission church. Whatever may have been his exact status under the ecclesiastical law, his real relation afterwards, and down to shortly before the institution of this suit, was that of rector for the parish of St. John. The defendant, Emma D. Elliott, was a member of that congregation, her husband was not a member and had no church connection with the parish; Ethelbert Talbot was bishop of the diocese of central Pennsylvania in which St. John's parish was situated and by the canons of the church had supervision and control of the religious affairs of the diocese and was the ecclesiastical superior of Irvine; at the end of proper proceedings under the canon law, he had power to discipline, remove, or even excommunicate the rector. From the date of Irvine's installation as rector there arose between him and Mrs. Elliott much hostility which was the subject of considerable correspondence between them and Bishop Talbot; there were charges of violation of church law made by Irvine against Mrs. Elliott and charges by her of immorality and forgery against him; there was a criminal prosecution against Irvine for forgery in connection with the matter which was heard in the criminal court and the indictment on his motion quashed on a technical objection. It is very clear, whether Irvine was right or wrong, that the bishop sided with Mrs. Elliott in these accusations. Finally, the trouble culminated in an ecclesiastical court for the trial of Irvine held January 25, 1900, which after a full hearing rendered judgment that Irvine had been guilty of conduct unbecoming a clergyman and that he should be degraded and debarred from the ministry and Bishop Talbot imposed sentence accordingly. Irvine then brought trespass against the Elliotts and the bishop for a wilful and malicious conspiracy to injure him by depriving him of his reputation and the right to exercise his calling in the ministry. There was a long and careful trial in the court below; the learned judge with the utmost patience heard all the testimony which by very liberal rulings had any bearing on the issue. At the close, being of the opinion, there was no evidence to sustain the claim of plaintiff, he peremptorily instructed the jury to find a verdict for defendant.

Plaintiff brings this appeal assigning many errors but there are in substance only two:

1. That defendants conspired to have plaintiff unlawfully deposed from the ministry.

2. That they conspired by unlawful means, to injure his reputation and standing as a Christian minister.

In the large mass of testimony adduced the court could find nothing to sustain either charge, nor can we. Undoubtedly defendants combined to prefer charges against Irvine in the church court and acted in concert to support the charges by what they and the court considered evidence. This was not unlawful, although their action was tinctured with vindictiveness in some particulars. They wanted him deposed from the ministry because they professed to believe him unfit for the office, and they sustained their belief by proof which convinced the court. That they also hated him and by their course possibly gratified less worthy motives than those which prompt a true Christian to action is of no moment, except in so far as it might have affected their credibility as witnesses before the court which tried him.

There is no law which imposes upon a common pleas jury the duty of passing upon the competency or impartiality of a church court. That court believed the evidence against Irvine; therefore, their judgment, even if not approved by Irvine and his friends, and even though not impartial, is not unlawful. He had full notice of the charges, appeared and was heard; the proceedings were lawful and pronounced so by a lawful court. This court, as we have said time and again, is not a court of review of the proceedings of ecclesiastical courts. As remarked in German Reformed Church v. Seibert, 3 Pa. 282, "Civil courts, if they would be so unwise as to attempt to supervise the judgments of church courts, on matters which come within their jurisdiction, would only involve themselves in a sea of uncertainty and doubt which do anything but improve either religion or good morals." Also see McGinnis v. Watson, 41 Pa. 9, Stack v. O'Hara, 98 Pa. 213, and Tuigg v. Sheehan, 101 Pa. 363.

Nor can we see any evidence, that defendants conspired by unlawful means to injure the rector in his reputation and standing. They preferred grave charges, supported by evi-

dence tending to establish them. There is nothing to show they manufactured evidence, committed perjury or suppressed the truth, to bring about a false judgment. It is conceded that the members of the court were men of integrity, could not have been corrupted. They may have been too credulous may have been mistaken as appellant argues. If so we can do nothing to aid him.

All the assignments of error are overruled and the judgment is affirmed.

Brew, Appellant, *v.* Hastings.

Partnership—Accounting—Dissolution.

Where stipulations in articles of copartnership for a term of ten years provide for the continuance of the firm after the death of a member, and that the representatives of a deceased partner shall not participate in the management, but shall receive six per cent per annum on the capital invested, and a share of the profits from year to year, the representatives of a deceased partner have no standing by bill in equity until the expiration of the term to demand an accounting for interest and profits, where the surviving partners by their answers show that the deceased partner at the time of his death had withdrawn from the firm an amount in excess of his interest therein.

Argued April 21, 1903. Appeal, No. 294, Jan. T., 1902, by plaintiff, from decree of C. P. Centre Co., April T., 1901, No. 2, dismissing bill in equity in case of George T. Brew, Administrator of George W. Jackson, Deceased, v. Daniel H. Hastings et al., trading as Jackson, Hastings & Company. Before Dean, Fell, Brown, Mestrezat and Potter, JJ. Affirmed.

Bill in equity for an account.

Love, P. J., filed the following opinion:

The plaintiff filed his bill, alleging the formation of the partnership of Jackson, Hasting & Company, August 31, 1897, between Geo. W. Jackson, Daniel H. Hastings, J. Henry Cochrane and Henry C. McCormick. That the capital stock was

$50,000, of which sum Geo. W. Jackson was to pay into the common fund $20,000; D. H. Hastings, $16,666⅔; J. Henry Cochrane, $6,666⅔, and H. C. McCormick, $6,666⅔. That the said Geo. W. Jackson did contribute his $20,000 to said capital stock. That Geo. W. Jackson died intestate October 22, 1897, and letters of administration duly issued to Geo. T. Brew, plaintiff, and Geo. L. Jackson. That Geo. L. Jackson died on or about May 21, 1900.

That the partnership was to continue for the term of ten years. That the fourth paragraph of the acticles of copartnership provided: "That in the event of the death of one or more of the partners before the expiration of the term fixed for the duration of the partnership, the capital of the deceased partner or partners shall remain in and be employed in the business until the end of the term for which this partnership is created unless otherwise agreed between the surviving partners or partner, and the legal representatives of the deceased partner or partners, and the survivor or survivors shall have the right to continue to use the copartnership name. The legal representatives of the deceased partner or partners in such case, however, shall be paid six per cent per annum on the capital invested by said partner or partners, and shall also participate from year to year, during the term aforesaid, in the earnings, in the same manner, in the same proportions and to the same extent, as the deceased partner himself would have participated under the terms of this agreement, had he continued in full life until the expiration of the term of the partnership hereby fixed. And it is further distinctly agreed that the surviving partner or partners shall have the entire, exclusive and independent management of the business as fully as all the partners now have, with no increased liability for mistakes, accidents or errors of judgment, and the legal representatives of any deceased copartner shall at no time have any voice in or power of control over the policy of the management or conduct in said business."

That the capital of said Geo. W. Jackson, deceased, interest and undivided profits have remained in said business under the custody and control of said defendants from the date of his death, October 22, 1897, to the time of filing the bill. That the plaintiff has repeatedly demanded the payment of the interest

due upon the capital of said Geo. W. Jackson in said business, and that the defendants have refused and still refuse to pay the same, and refuse to render any statement or account of the profits of said business.

The prayers are for a decree for the payment of $3,600, the amount of interest alleged to be due on the capital of the decedent in said partnership, and for an accounting of the profits thereof to the time of the filing of said bill.

The answer admits most of the facts alleged in the bill. It denies that any demand was made for the payment of the interest by the plaintiff. It denies the liability of the defendants to pay the interest, or to account. It alleges that the decedent was largely indebted to the partnership; that the administrators paid on account of the said indebtedness the sum of about $43,000; that the estate of the decedent is still indebted to the partnership, in excess of the capital stock of said decedent in the partnership, and that there is no liability to account, until the term of the partnership expires. The answer also alleges that the matters alleged in the bill are res adjudicata; that they were passed upon and determined in No. 1, August term, 1898, between the same parties, when this court decreed an accounting to be had, from which an appeal was taken to the Supreme Court and the decree of the lower court reversed, reported in Brew v. Hastings et al., 196 Pa. 222.

The facts, as appear from the pleadings and evidence, are as follows: The firm or copartnership of Jackson, Hastings & Company was formed between Geo. W. Jackson, D. H. Hastings, J. Henry Cochrane and H. C. McCormick, August 31, 1897. The contract of partnership was in writing of that date and prescribed the terms and conditions of the partnership, the term of ten years for which it was to continue and fixed the capital stock at $50,000. Geo W. Jackson paid into the concern $20,000 as his share; D. H. Hastings, $16,666⅔, and each of the other partners $6,666⅔ each. It was provided that the death of one or more of the partners should not work a dissolution of the partnership; that the capital of a deceased partner should remain in the business until the expiration of the term provided for in the agreement, and that the legal representatives of a deceased partner should receive six per cent per annum upon the capital of such deceased partner, as well as

participate from year to year in the earnings, in the same manner and in the same proportions and to the same extent, as the deceased partner would have done, while living. The survivor or survivors are to have the exclusive and entire control of the business. Geo. W. Jackson died on or about October 22, 1897. That the survivors have continued the business in the firm name of Jackson, Hastings & Company ever since. That the survivors or the firm have neither paid the interest, as provided in the agreement, nor have they rendered any account of the profits or earnings of the business from year to year, but have refused to pay the interest or render any account of the earnings of the business to the legal representative of the estate of said Geo. W. Jackson, deceased.

That the plaintiff, the duly qualified administrator of the estate of Geo. W. Jackson, deceased, has demanded the payment of the interest and an account of the earnings of the business from the defendants, but they have refused to either pay the interest or to render any account. The defendants, however, contend that they are not liable to either pay the interest claimed by the plaintiff or account as provided in the articles of copartnership, because they allege the estate of Geo. W. Jackson is still indebted to the partnership to an amount in excess of his capital stock therein. This is denied by the plaintiff.

The real question, therefore, involved is as to the right of the defendants to set off their alleged claim against the said estate against the claim of the plaintiff, based upon the express terms and conditions of the contract of copartnership.

The contention of the defendants involves the following propositions:

1. The right, that under the contract of copartnership, because of the alleged indebtedness of the estate of Geo. W. Jackson, deceased, to the firm, they are not liable, legally or equitably, to pay the interest, as provided in the agreement or to account.

2. That, notwithstanding that the legal representatives of the estate of said decedent deny said alleged indebtedness, yet the defendants are in nowise obliged to establish said claim against said estate by legal proof, and that they have the right to refuse the inspection or examination of the books and ac-

counts of the firm to the plaintiff, whereby the justness and legality of said alleged indebtedness could be determined.

3. That, because of the said alleged indebtedness due the firm, that the defendants, without proving their claim, can offset it against the demands of the plaintiff, based on the express terms of the contract of copartnership, and thus they assume the right to distribute the estate of the decedent, regardless of the rights of other creditors thereof or of the insolvency of the estate.

4. That the said alleged claim of the firm against the estate, without duly proving the same or putting it in judgment, is entitled to preference over the claims of other creditors of said estate, and further, that the defendants can definitely violate and repudiate the terms of the contract of copartnership and refuse to be bound by, or comply with the terms thereof while the legal representatives of the estate of Geo. W. Jackson are to be held and bound by the very letter of it, until it expires by its own limitation.

These propositions are practically the same as were involved when the case was before us in the case of Brew v. Hastings et al., to No. 1, August term, 1898. We then found and held that partnership was practically dissolved; not because the evidence of a parol agreement to dissolve warranted it, as we distinctly said it did not, but that the parties so treated it, and we decreed a dissolution of it. The decree was based upon all the evidence, acts and the claim of the defendants that they were not obliged to comply with the terms of the articles of copartnership, and did not propose to. That they did not propose to pay the annual interest upon the capital of the estate of Geo. W. Jackson in the business, or allow his legal representatives to also participate from year to year in the earnings of the business. They assumed, as they do now, that because of their alleged claim against the estate of said decedent, they could appropriate the capital of said decedent to the payment of their claim, the legality of which was denied, without legally proving the same or putting it in judgment, and thus liquidate the interest of said decedent in the partnership in their own way, regardless of the rights of other creditors of the estate, or of its insolvency. We had always understood the law to be, and in fact had not heard it mooted, that a con-

tract should be mutually binding upon all parties to it; and, if one or the other of the parties refuse to be bound or comply with its terms, that the other could have a remedy for the breach thereof or rescind the contract. Thus the contractual relation would be dissolved and, if it were a contract of partnership, it would work its dissolution, and the accounts of the partnership would be subject to adjustment and settlement and the rights of the parties determined.

Inasmuch as the defendants claimed the right and assumed to liquidate the interest of the estate of Geo. W. Jackson in the copartnership, with the other facts in the case, and their refusal to abide by the terms of the agreement, we felt warranted in decreeing a dissolution of the partnership, when the case was before us on the prior hearing. We also held that, if the estate was indebted to the firm as alleged, that the firm, as a creditor of the estate, had no preference over other creditors, and that the defendants could not assume to distribute in their own way the estate of the decedent.

This is a preliminary hearing, asking for a decree, ordering an account and the payment of money. The defendants take the same position now that they did in the former hearing and trial. They deny their legal liability to pay the interest on the capital of decedent's estate paid into the partnership annually, and to pay the earnings from year to year, as provided in the agreement, because they allege the estate is indebted to them in excess of the amount of the said capital paid in. In other words, they are not obliged to perform their part of the contract. They do not retain the said capital as a loan under the articles, but appropriate it to a claim that is disputed. Suppose the defendants asserted no claim against the estate of Geo. W. Jackson, and the defendants refused to pay the interest and the earnings from year to year, as provided in the agreement, would it be held that the estate would be bound by the letter of the agreement, and would be remediless, until the term of the partnership expired by the limitation therein provided? We hardly think so.

So the question involved in the case is, whether one party to a contract is to be bound and the other not? Whether the defendants, because of an alleged claim, which is denied by the plaintiff, can assume to appropriate the interest of Geo.

W. Jackson, deceased, to the payment thereof, without legally proving the same or subjecting it to proper investigation and examination, and thus liquidate the interest of said estate in the partnership, and further whether the defendant can assume to distribute the estate of said decedent, regardless of the rights of other creditors or its insolvency; the defendants contend they have such right. It would appear from the decision in Brew v. Hastings et al., 196 Pa. 222, it was meant to sustain the contention of the defendants and that they are not liable to account. Under that decision, we feel constrained to dismiss the bill, and refuse the prayers thereof.

Error assigned was the decree of the court.

Charles P. Hewes, with him *John M. Dale*, for appellant.

Seth T. McCormick, with him *Wilbur F. Reeder*, for appellees.

Per Curiam, May 11, 1903:

In the case of Brew v. Hastings et al., 196 Pa. 222, we decided that the partnership agreement between the parties of September 1, 1897, was a valid one equally binding upon all and that their rights and remedies against each other must be defined and restricted by its terms. That suit was brought in 1899, the one before us in March, 1901. We did not hold in the former, nor do we hold in this case, that defendants are not accountable; we do hold, that under the agreement the suits for an account now are premature and the decree of the learned judge of the court below is to that effect, although his reasoning would lead to an entirely different one. In substance, part of the argument of the able counsel for appellant is an apology for the inconsistent reasons given; but these are immaterial; as we have more than once said, we do not review reasons for judgments. If the judgment be right, even though the reasons given wholly fail to sustain it, or would logically lead to a different one, it must stand.

In the first case, in our view of the law, we felt compelled to reverse the judgment and at some length we gave our reasons therefor; in the present case, the learned judge of the court

below inadvertently fell into the mistake of assuming that one of his functions was that of reviewing a decree of this court, while the law and the constitution restrict that function to a vindication of his own; hence this anomalous record of an opinion calling for a decree in favor of plaintiff, yet concluding with one in favor of defendants. But as the decree is right, the reasons work no material injury to anybody; we pass them over therefore as harmless and affirm his decree.

Decree affirmed accordingly.

Kuntz *v.* New York, Chicago & St. Louis Railroad Company, Appellant.

Negligence—Railroads—Crossings—"Stop, look and listen."

In a grade crossing accident case, although the weight of testimony on the question whether proper notice was given of the approach of the train at the crossing may be with the defendant, yet the case must be submitted to the jury if three witnesses for plaintiff testify that they were listening for some signal by bell or whistle of the approach of the train, and heard none. Such testimony is more than a scintilla, and of a higher grade than merely negative testimony.

In an action against a railroad company to recover damages for personal injuries, it appeared that plaintiff with two companions was going to his work at six o'clock in the morning in the early part of February. This was before daylight, and a snowstorm of unusual force and severity was prevailing. The temperature was six degrees above zero, and the wind was blowing at the rate of thirty miles an hour. Several inches of snow had fallen, drifts had formed on the sidewalks, and the men were walking in the middle of the street. When they reached the crossing of defendants' road in a populous part of a city, they stopped within five feet of the track and looked both ways, and listened for the sound of a bell or whistle. They heard neither and walked on the single track, and the plaintiff was struck by an engine which was running thirty-five or forty miles an hour on a down grade with the steam off. The headlight of the engine was to some extent obscured by the snow that clung to the glass, and by snow in the surrounding atmosphere. At the place where the men stopped, an engine could be seen in daylight under ordinary circumstances when 1,500 feet away. *Held*, that the question of contributory negligence of the plaintiff was for the jury.

Practice, C. P.—Trial—Appeals.

Errors alleged to have been committed by the judge in referring to the

testimony, if not brought to the attention of the lower court at the trial will not be considered by the appellate court.

Argued April 28, 1903. Appeal, No. 96, Jan. T., 1903, by defendant, from judgment of C. P. Erie Co., May T., 1903, No. 120, on verdict for plaintiff in case of Frank Kuntz v. New York, Chicago & St. Louis Railroad Company. Before MITCHELL, DEAN, FELL, MESTREZAT and POTTER, JJ. Affirmed.

Trespass to recover damages for personal injuries. Before WALLING, P. J.

The facts are stated in the opinion of the Supreme Court.

Verdict and judgment for plaintiff for $8,901. Defendant appealed.

Error assigned was in submitting the case to the jury.

Frank Gunnison, for appellant.

J. M. Sherwin and *S. A. Davenport*, with them *A. P. Howard*, for appellee.

OPINION BY MR. JUSTICE FELL, May 11, 1903:

The principal error assigned is that the court did not take the case from the jury on the grounds, (1) that there was not sufficient evidence of negligence on the part of the defendant to warrant a recovery; (2) that the plaintiff failed to present a case clear of contributory negligence on his part.

The weight of testimony on the question whether proper notice was given of the approach of the train to the crossing was undoubtedly with the defendant. But three witnesses on behalf of the plaintiff testified that they were listening for some signal by bell or whistle of the approach of the train and heard none. This testimony was more than a scintilla, and of a higher grade than merely negative testimony: Longenecker v. Railroad Co., 105 Pa. 328; Quigley v. Del. & H. Canal Co., 142 Pa. 388; Daubert v. Delaware, etc., Railroad Co., 199 Pa. 345. It raised an issue that was clearly for the jury.

The facts that must be considered as established in determining whether the plaintiff was negligent are these. With two companions he was going to his work at six o'clock in the

morning in the early part of February. This was before daylight, and a snowstorm of unusual force and severity was prevailing. The temperature was six degrees above zero, and the wind was blowing at the rate of thirty miles an hour. Several inches of snow had fallen, drifts had formed on the sidewalks, and these men were walking in the middle of the street. When they reached the crossing of the defendants' road in a populous part of the city of Erie, they stopped within five feet of the track and looked both ways, and listened for the sound of a bell or whistle. They heard neither and walked on the single track, and the plaintiff was struck by an engine which was running thirty-five or forty miles an hour on a down grade with the steam off. The headlight of the engine was to some extent obscured by the snow that clung to the glass, and by snow in the surrounding atmosphere. At the place where the men stopped, an engine could be seen in daylight under ordinary circumstances when 1,500 feet away.

The court instructed the jury that if the accident had occurred on a clear morning or in the daytime when the headlight of the engine could have been seen, the plaintiff could not recover. But it was left to the jury to say whether under the circumstances, the plaintiff's view being obstructed by wind and snow, he had exercised reasonable care. This instruction was correct. The question of contributory negligence cannot be treated as one of law unless the facts and the inferences to be drawn from them are free from doubt. If there is doubt as to either, the case is for the jury. It was the duty of the plaintiff to stop, look and listen before placing himself in a position of danger, and to continue to look as he approached and crossed the track. Ordinarily a pedestrian, when there is nothing to prevent his seeing and hearing, will not be heard to say that he did not see a train which could have been plainly seen if he had looked. But the rule established by Carroll v. Railroad Co., 12 W. N. C. 348, and Marland v. Railway Co., 123 Pa. 487, and since followed, is applicable only in clear cases where a person steps in front of a moving train which he could see: McNeal v. Railway Co., 131 Pa. 184; Laib v. Railroad Co., 180 Pa. 503; Muckinhaupt v. Railroad Co., 196 Pa. 213; Bard v. Railway Co., 199 Pa. 94. According to his testimony the plaintiff in this case did not proceed recklessly in crossing the

defendant's tracks. He stopped within five feet of them to ascertain whether a train was approaching. The storm prevented his seeing more than fifty or one hundred feet, and made his progress more difficult. Whether under the circumstances he exercised proper care was for the jury.

The errors alleged to have been committed in referring to the testimony were not brought to the attention of the court at the time, and the assignments founded upon them need not be considered: Provident Life & Trust Co. v. Philadelphia, 202 Pa. 78, and cases there cited.

The judgment is affirmed.

Commonwealth ex rel. Wadsworth *v.* Shortall.

Martial law—Government—Riots—Order of governor.

Martial law exists wherever the military arm of the government is called into service to suppress disorder, and restore the public peace.

Where the governor of the commonwealth issues a general order calling out the militia for the purpose of suppressing violence and maintaining public peace in a district affected by a strike, such an order is a declaration of qualified martial law, in the affected district. It is qualified in that it is put in force only as to the preservation of the public peace and order, and not for the ascertainment or vindication of private rights, or the other ordinary functions of government. For these the courts and other agencies of the law are still open. But within its necessary field, and for the accomplishment of its intended purpose, it is martial law with all its powers.

The resort to the military arm of the government by such an order means that the ordinary civil officers to preserve order are subordinated, and the rule of force under military methods is substituted to whatever extent may be necessary in the discretion of the military commander.

The effect of martial law is to put into operation the powers and methods vested in the commanding officer by military law. So far as his powers for the preservation of order and security of life and property are concerned there is no limit but the necessities and exigency of the situation. And in this respect there is no difference between a public war and domestic insurrection. What has been called the paramount law of self-defense, common to all countries, has established the rule that whatever force is necessary is also lawful.

While the military are in active service in the suppression of disorder and violence, their rights and obligations as soldiers must be judged by the standard of actual war.

A soldier is bound to obey an order given by his superior officer which does not expressly and clearly show on its face, or in the body thereof, its own illegality, and such order will be a protection to the soldier.

A homicide by a member of the militia called out to suppress disorder, committed without malice in the performance of his supposed duty as a soldier, and under the order of an officer, is excusable, unless it is manifestly beyond the scope of the militiaman's authority, or is such as a man of ordinary understanding would know was illegal.

The governor of the Commonwealth issued a general order calling out a division of the militia for the purpose of preserving the public peace in certain counties in which a strike of miners was taking place, and in which tumults, riots and mobs prevailed. The militia was called out, and the general in command placed a corporal's guard at a house which had been attacked with dynamite, and directed the members of the guard, if any attempt was made upon the house, or any person approached the house and failed to halt when directed, to shoot, and shoot to kill. One of the sentries, near midnight, discovered a man approaching the house, and he called upon him four times to halt. The man disobeyed the order, and the sentry shot and killed him. These facts were undisputed. The sentry was subsequently arrested on a warrant, but on habeas corpus proceedings in the Supreme Court, was released on bail. *Held*, that the relator should be discharged, inasmuch as the evidence against him failed to show a prima facie case.

Argued Jan. 5, 1903. Habeas corpus, Miscellaneous Docket 1902, No. 87, Western District, in the matter of Commonwealth ex rel. Arthur Wadsworth v. William Shortall. Before MITCHELL, DEAN, FELL, BROWN, MESTREZAT and POTTER, JJ.

Petition for writ of habeas corpus on behalf of the relator against respondent, a constable who had him in custody under a warrant of arrest for homicide, issued by a justice of the peace in Schuylkill County.

Frederic W. Fleitz and *John F. Whalen*, for commonwealth.—The supreme executive power of the state is vested in the governor, and he has authority to execute the laws and to preserve peace and order: In re Neagle, 135 U. S. 1 (10 Sup. Ct. Repr. 650).

A homicide committed by a soldier under the orders of his superior officers has been held to be excusable in a line of cases, notably in the case of U. S. v. Clark, 31 Fed. Repr. 710, United States v. Carr, 1 Woods, 480, and McCall v. McDowell, 1 Abb. (U. S.) 212.

M. P. McLoughlin, district attorney, with him *George Dyson*, for respondent.

OPINION BY MR. JUSTICE MITCHELL, April 17, 1903:

A somewhat full statement of the facts will be conducive to the proper understanding of the case.

During the summer of 1902 a strike, beginning with a labor union known as the United Mine Workers of America, spread through nearly the whole of the anthracite coal region in Pennsylvania. As time progressed it was accompanied with increasing disorder and violence on the part of the strikers and their sympathizers, so that threats and intimidation not only of men but of their women and children, rioting, bridge burning, stoning and interference with railroad trains, destruction of property and killing of non-union workmen became of frequent occurrence. The communities affected were either in secret sympathy with these acts or lacked the courage to put an end to them.

Among the places where the disorder was greatest was Shenandoah in Schuylkill county. There the police and the sheriff in attempting to preserve the peace were overpowered and beaten by mobs of strikers, and several citizens killed. The sheriff having called upon the governor, the latter first ordered out a portion of the militia and subsequently on further call, the entire division of the National Guard, on October 6, 1902, by General Order No. 39.

The text of this order which is important is as follows: "In certain portions of the counties of Luzerne, Schuylkill, Carbon, Lackawanna, Susquehanna, Northumberland and Columbia, tumult and riot frequently occur and mob law reigns. Men who desire to work have been beaten and driven away and their families threatened. Railroad trains have been delayed and stoned, and tracks torn up. The civil authorities are unable to maintain order and have called upon the Governor and Commander-in-Chief of the National Guard for troops. The situation grows more serious each day. The territory involved is so extensive that the troops now on duty are insufficient to prevent all disorder. The presence of the entire Division, National Guard of Pennsylvania, is necessary in these counties to maintain the public peace. The Major General

commanding will place the entire Division on duty, distributing them in such localities as will render them most effective for preserving the public peace. As tumults, riots, mobs and disorder usually occur when men attempt to work in and about the coal mines, he will see that all men who desire to work, and their families, have ample protection. He will protect all trains and other property from unlawful interference, will arrest all persons engaging in acts of violence and intimidation, and hold them under guard until their release will not endanger the public peace, and will see that threats, intimidations, assaults and all acts of violence cease at once. The public peace and good order will be preserved upon all occasions and throughout the several counties, and no interference whatsoever will be permitted with officers and men in the discharge of their duties under this order. The dignity and authority of the State must be maintained, and her power to suppress all lawlessness within her borders be asserted."

Under this order the 18th Regiment, being part of the troops under command of Brigadier General Gobin, was stationed in and near Shenandoah. Several houses occupied by non-union men had been dynamited and attempts made upon others. On October 8, therefore, General Gobin issued the following order: "At 5:30 P. M. a detail of one corporal and six men should be put at the house of Barney Bucklavage, No. 1118 West Coal street; this house was dynamited on the night of October 6th and is occupied by a woman and four small children, and for the present I deem it best to guard it; my instructions to the guard have been that they shall keep a sentry at the front door sitting inside the house with the door ajar, and one sentry sitting just outside the rear door under the porch, and if any attempt is made to dynamite them, or they are shot at, or stoned, or any suspicious characters prowl around, particularly in the rear of the house, who fail to halt when directed by the guard, the guard shall shoot, and shoot to kill."

The relator, Arthur Wadsworth, was a private in Company A of the 18th Regiment, in service there, and in the evening of October 8 was posted as sentry in the front yard of the Bucklavage house, just outside the door, with orders to halt all persons prowling around or approaching the house, and if the persons so challenged failed to respond to the challenge after due

warning "to shoot, and shoot to kill." About 11:30 o'clock he discovered a man approaching along the side of the road nearest the house and called "Halt." The man continued to advance toward the gate. Wadsworth called again "Halt." The man continued to advance. Wadsworth then touched the door and said "Corporal of the guard." He then called "Halt" and again "Halt." The man by this time had opened the gate and was coming into the yard, when Wadsworth, in accordance with his orders, fired and the man, whose name was afterwards found to be Durham, fell to the ground dead.

A coroner's inquest was held and the jury found that "the shooting was hasty and unjustifiable" and recommended that the matter be placed in the hands of the district attorney for investigation. In the meantime on complaint before a justice of the peace, a warrant had been issued for the arrest of Wadsworth, and after the return of the regiment from service he was arrested at his home in Pittsburg by the respondent, a constable of the borough of Shenandoah. A writ of habeas corpus was allowed by the presiding justice of this court, and the commonwealth not making any charge higher than manslaughter, the relator was admitted to bail, pending the argument of the case.

These are all the material facts and they are undisputed. The only appearance of question is in the testimony of some of the witnesses at the inquest that the deceased was outside the gate when they saw him after he had fallen. The relator and some others of the guard testified that the deceased had opened the gate and entered but staggered back several steps after the shot was fired.

The issue of General Order No. 39 by the governor was a declaration of qualified martial law, in the affected districts. In so characterizing it we are not unmindful of the eminent authorities who have declared that martial law cannot exist in England or the United States at all, or at least, according to the more moderate advocates of that view, not in time of peace. Thus in Ex parte Milligan, 71 U. S. 2, 127, it is said in the opinion of the majority of the court, "martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction." But in the dissenting opinion in the same case, Chief Justice CHASE convincingly

distinguished three classes of military rule, which are thus summarized by Judge HARE in his lectures on American Constitutional Law (p. 930): "Military law, then, consists of the rules prescribed legislatively for the government of the land and naval forces, which, operating both in war and peace, and defined by Congress, are an offshoot of the civil or municipal law. Military government is the dominion exercised by a general over a conquered State or province. It is therefore a mere application or extension of the force by which the conquest was effected, to the end of keeping the vanquished in subjection; and being a right derived from war, is hardly compatible with a state of peace. Martial law is the right of a general in command of a town or district menaced with a siege or insurrection to take the requisite measures to repel the enemy, and depends, for its extent, existence, and operation, on the imminence of the peril and the obligation to provide for the general safety. As the offspring of necessity, it transcends the ordinary course of law, and may be exercised alike over friends and enemies, citizens and aliens."

Many other authorities of equal rank hold that martial law exists wherever the military arm of the government is called into service to suppress disorder and restore the public peace. So far as any of the questions in the present case are concerned the difference is one of terms rather than of substance and is material chiefly in regard first to the jurisdiction of courts martial or military commissions over citizens not in the military or naval service, nor engaged in recognized war, or secondly, to the responsibility of officers or soldiers giving or acting under military orders, when not in actual war, to be called to account in the civil or criminal courts. With the first of these matters we are not now concerned, and the second will be discussed in its due order.

Order No. 39 was as said a declaration of qualified martial law. Qualified in that it was put in force only as to the preservation of the public peace and order, not for the ascertainment or vindication of private rights, or the other ordinary functions of government. For these the courts and other agencies of the law were still open and no exigency required interference with their functions. But within its necessary field, and for the accomplishment of its intended purpose it

was martial law with all its powers. The government has and must have this power or perish. And it must be real power, sufficient and effective for its ends, the enforcement of law, the peace and security of the community as to life and property.

It is not unfrequently said that the community must be either in a state of peace or of war, as there is no intermediate state. But from the point of view now under consideration this is an error. There may be peace for all the ordinary purposes of life and yet a state of disorder, violence and danger in special directions, which though not technically war, has in its limited field the same effect, and if important enough to call for martial law for suppression, is not distinguishable, so far as the powers of the commanding officer are concerned, from actual war. The condition in fact exists, and the law must recognize it, no matter how opinions may differ as to what it should be most correctly called. When the civil authority, though in existence and operation for some purposes, is yet unable to preserve the public order and resorts to military aid, this necessarily means the supremacy of actual force, the demonstration of the strong hand usually held in reserve and operating only by its moral influence, but now brought into active exercise, just as the ordinary criminal tendency in the community is held in check by the knowledge and fear of the law, but the overt law breaker must be taken into actual custody.

When the mayor or burgess of a municipality finds himself unable to preserve the public order and security and calls upon the sheriff with the posse comitatus, the latter becomes the responsible officer and therefore the higher authority. So if in turn the sheriff finds his power inadequate, he calls upon the larger power of the state to aid with the military. The sheriff may retain the command, for he is the highest executive officer of the county, and if he does so, ordinarily the military must act in subordination to him. But if the situation goes beyond county control, and requires the full power of the state, the governor intervenes as the supreme executive and he or his military representative becomes the superior and commanding officer. So too if the sheriff relinquishes the command to the military, the latter has all the sheriff's authority added to his own powers as to military methods.

The resort to the military arm of the government therefore means that the ordinary civil officers to preserve order are subordinated, and the rule of force under military methods is substituted to whatever extent may be necessary in the discretion of the military commander. To call out the military and then have them stand quiet and helpless while mob law overrides the civil authorities, would be to make the government contemptible and destroy the purpose of its existence.

The effect of martial law, therefore, is to put into operation the powers and methods vested in the commanding officer by military law. So far as his powers for the preservation of order and security of life and property are concerned, there is no limit but the necessities and exigency of the situation. And in this respect there is no difference between a public war and domestic insurrection. What has been called the paramount law of self-defense, common to all countries, has established the rule that whatever force is necessary is also lawful.

"Whatever force is necessary for self-defense is also lawful. This law, applied nationally, is the martial law, which is an offshoot of the common law, and although ordinarily dormant in peace, may be called forth by insurrection or invasion. War has exigencies, that cannot readily be enumerated or described, which may render it necessary for a commanding officer to subject loyal citizens, or persons who though believed to be disloyal have not acted overtly against the government, to deprivations that would under ordinary circumstances be illegal; and he must then depend for his justification, not on the laws of war, but on the necessity which, as has been here seen, may warrant the taking of life, and will therefore excuse any minor deprivation:" Hare, Am. Constitutional Law, lect. xlii, p. 924.

"When a riot assumes such proportions that it cannot be quelled by ordinary means, and theatens irreparable injury to life or property, the sheriff may call forth the posse comitatus and exercise an authority as their chief which can hardly be distinguished from that of a general engaged in repelling a foreign enemy or subduing a revolt. Arms may be used as in battle to bear down resistance; and if loss of life ensues, the circumstances will be a justification. The measure does not, however, cease to be civil, or fall beyond the rules which apply

when a house is entered in the night by burglars, or a traveler shoots a highwayman who demands his money. Nor will it change its character because the military are called in and the sheriff delegates his authority to the commanding officer. As Lord MANSFIELD showed in the debate on the Lord George Gordon riots in 1780, soldiers are subject to the duties and liabilities of citizens, although they wear a uniform, and may, like other individuals, act as special constables or of their own motion for the suppression of a mob, and if the staff does not suffice employ the sword. The intervention of the military does not introduce martial law in the sense in which the term is understood under despotic governments, and even by some distinguished jurists, because, agreeably to the same great magistrate and the settled practice in England and the United States, they are liable to be tried and punished for any excess or abuse of power, not by the martial code, but under the common and statute law:" Hare, Am. Const. Law, lect. xli, p. 906.

This last quotation illustrates and explains the difference in the application of the term martial law which has given so much apparent trouble to some of the text writers. There is no real difference in the commander's powers in a public war and in domestic insurrection. In both he has whatever powers may be needed for the accomplishment of the end but his use of them is followed by different consequences. In war he is answerable only to his military superiors, but for acts done in domestic territory, even in the suppression of public disorder, he is accountable, after the exigency has passed, to the laws of the land, both by prosecution in the criminal courts, and by civil action at the instance of parties aggrieved. On this all the authorities agree, and the result flows from the view that martial law in this sense is merely an extension of the police power of the state, and therefore, as expressed by Judge HARE in the quotation supra, an "offshoot of the common law which though ordinarily dormant in peace, may be called forth by insurrection or invasion." See Respublica v. Sparhawk, 1 Dallas, 357, Mitchell v. Harmony, 13 How. (U. S.) 115, Ford v. Surget, 97 U. S. 594, and English cases cited in 2 Hare on Const. Law, ch. xli.

In determining the responsibility for such acts, the courts pro-

ceed upon the principle of the common law as applied in issues of false imprisonment, self-defense, etc., that the acts must be judged by the appearance of things at the time. "It is not less clear that although the justification must be based on necessity, and cannot stand on any other ground, it will be enough if the circumstances induce and justify the belief that an imminent peril exists, and cannot be averted without transcending the usual rules of conduct. For when the exigency does not admit of delay, and there is a reasonable and probable cause for believing that a particular method is the only one that can avert the danger, it will be morally necessary, even if the event shows that a different and less extreme course might have been pursued with safety:" Hare, Const. Law, p. 917.

"It is the emergency that gives the right, and the emergency must be shown before the taking can be justified. In deciding upon this necessity, the state of the facts as they appear to the officer at the time he acted will govern the decision, for he must necessarily act upon the information of others as well as his own observation. And if, with such information as he had a right to rely upon, there is reasonable ground for believing that the peril is immediate and menacing or the necessity urgent, he is justified in acting upon it, and the discovery afterwards that it was false or erroneous will not make him a trespasser:" Taney, C. J., Mitchell v. Harmony, 13 How. 115.

And while the military are in active service for the suppression of disorder and violence, their rights and obligations as soldiers must be judged by the standard of actual war. No other standard is possible, for the first and overruling duty is to repress disorder, whatever the cost, and all means which are necessary to that end are lawful. The situation of troops in a riotous and insurrectionary district approximates that of troops in an enemy's country, and in proportion to the extent and violence of the overt acts of hostility shown is the degree of severity justified in the means of repression. The requirements of the situation in either case, therefore, shift with the circumstances, and the same standard of justification must apply to both. The only difference is the one already adverted to, the liability to subsequent investigation in the courts of the land after the restoration of order.

Coming now to the position of the relator, in regard to re-

sponsibility, we find the law well settled. "A subordinate stands as regards the application of these principles, in a different position from the superior whom he obeys, and may be absolved from liability for executing an order which it was criminal to give. The question is, as we have seen, had the accused reasonable cause for believing in the necessity of the act which is impugned, and in determining this point, a soldier or member of the posse comitatus may obviously take the orders of the person in command into view as proceeding from one who is better able to judge and well informed; and if the circumstances are such that the command may be justifiable, he should not be held guilty for declining to decide that it is wrong with the responsibility incident to disobedience, unless the case is so plain as not to admit of a reasonable doubt. A soldier, consequently, runs little risk in obeying any order which a man of common sense so placed would regard as warranted by the circumstances:" Hare, Const. Law, p. 920.

The cases in this country have usually arisen in the army and been determined in the United States courts. But by the Articles of War (art. 59) under the acts of congress, officers or soldiers charged with offenses punishable by the laws of the land, are required (except in time of war) to be delivered over to the civil (i. e. in distinction from military) authorities; and the courts proceed upon the principles of the common (and statute) law: 31 Fed. Repr. 711. The decisions therefore are precedents applicable here.

A leading case is U. S. v. Clark, 31 Fed. Repr. 710. A soldier on the military reservation at Fort Wayne had been convicted by court martial and when brought out of the guardhouse with other prisoners at "retreat," broke from the ranks and was in the act of escaping when Clark, who was the sergeant of the guard, fired and killed him. Clark was charged with homicide and brought before the United States district judge, sitting as a committing magistrate. Judge BROWN, now of the Supreme Court of the United States, delivered an elaborate and well considered opinion, which has ever since been quoted as authoritative. In it he said, "The case reduces itself to the naked legal proposition whether the prisoner is excused in law in killing the deceased." Then after referring to the common-law principle that an officer having custody of

a prisoner charged with felony may take his life if it becomes absolutely necessary to do so to prevent his escape, and pointing out the peculiarities of the military code which practically abolish the distinction between felonies and misdemeanors, he continued, "I have no doubt the same principle would apply to the acts of a subordinate officer, performed in compliance with his supposed duty as a soldier; and unless the act were manifestly beyond the scope of his authority, or were such that a man of ordinary sense and understanding would know that it was illegal, that it would be a protection to him, if he acted in good faith and without malice."

In McCall v. McDowell, 1 Abb. (U. S.) 212, where an action was brought by plaintiff against Gen. McDowell and Capt. Douglas for false imprisonment under a general order of the former for the arrest of persons publicly exulting over the assassination of President Lincoln, the court said, "Except in a plain case of excess of authority, where at first blush it is apparent and palpable to the commonest understanding that the order is illegal, I cannot but think that the law will excuse a military subordinate, when acting in obedience to the order of his commander, otherwise he is placed in a dangerous dilemma of being liable to damages to third persons, for obedience to the order, or for the loss of his commission and disgrace for disobedience thereto. . . . . Between an order plainly legal and one palpably otherwise there is a wide middle ground where the ultimate legality and propriety of orders depends or may depend upon circumstances and conditions, of which it cannot be expected that the inferior is informed or advised. In such cases justice to the subordinate demands, and the necessities and efficiency of the public service require that the order of the superior should protect the inferior, leaving the responsibility to rest where it properly belongs, upon the officer who gave the command." The court sitting without a jury accordingly gave judgment for Capt. Douglas, though finding damages against Gen. McDowell.

In U. S. v. Carr, 1 Woods, 480, which was a case of the shooting of a soldier in Fort Pulaski by the prisoner who was sergeant of the guard, Woods, J., afterwards of the Supreme Court of the United States, charged the jury: "Place yourselves in the position of the prisoner at the time of the homicide. In-

quire whether at the moment he fired his piece at the deceased, with his surroundings at the time, he had reasonable ground to believe, and did believe, that the killing or serious wounding of the deceased was necessary to the suppression of a mutiny then and there existing, or of a disorder which threatened to ripen into mutiny. If he had reasonable ground so to believe, then the killing was not unlawful. But if on the other hand the mutinous conduct of the soldiers, if there was any such, had ceased, and it so appeared to the prisoner, or if he could reasonably have suppressed the disorder without the resort to such violent means as the taking of the life of the deceased, and it would so have appeared to a reasonable man under like circumstances, then the killing was unlawful. But it must be understood that the law will not require an officer charged with the order and discipline of a camp or fort to weigh with scrupulous nicety the amount of force necessary to suppress disorder. The exercise of a reasonable discretion is all that is required."

In Riggs v. State, 4 Cold. 85, the Supreme Court of Tennessee held to be correct an instruction to the jury that "any order given by an officer to his private which does not expressly and clearly show on its face, or in the body thereof, its own illegality, the soldier would be bound to obey, and such order would be a protection to him."

These are the principal American cases and they are in entire accord with the long line of established authorities in England.

Applying these principles to the act of the relator, it is clear that he was not guilty of any crime. The situation as already shown was one of martial law, in which the commanding general was authorized to use as forcible military means for the repression of violence as his judgment dictated to be necessary. The house had been dynamited at night and threatened again. With an agent so destructive, in hands so lawless, the duty of precaution was correspondingly great. There was no ground therefore for doubt as to the legality of the order to shoot. The relator was a private soldier and his first duty was obedience. His orders were clear and specific, and the evidence does not show that he went beyond them in his action. There was no malice for it appears affirmatively that he did not

know the deceased, and acted only on his orders when the situation appeared to call for action under them. The unfortunate man who was killed was not shown to have been one of the mob gathered in the vicinity, though why he should have turned into the gate is not known. The occurrence, deplorable as it was, was an illustration of the dangers of the lawless condition of the community, or of the minority who were allowed to control it, and must be classed with the numerous instances in riots and mobs, where mere spectators and even distant non-combatants get hurt without apparent fault of their own.

Whenever a homicide occurs it is not only proper but obligatory that an official inquiry should be made by the legal authorities. Such an inquiry was had here at the coroner's inquest, and if there were any doubt about the facts we should remand the relator to the custody of the constable under his warrant, for a further hearing before the justice of the peace. But there was no conflict in the evidence before the coroner, and the commonwealth's officer makes no claim here that anything further can be shown. The facts therefore are not in dispute, and the question of relator's liability depends on whether he had reasonable cause to believe in the necessity of action under his orders. As said by Judge HARE, citing Lord MANSFIELD in Mostyn v. Fabrigas, 1 Cowper, 161, "The question of probable cause in this as in most other instances, is one of law for the court. The facts are for the jury; but it is for the judges to say whether, if found, they amount to probable cause:" Hare's Const. Law, 919.

In U. S. v. Clark, 31 Fed. Repr. 710, already cited, Mr. Justice BROWN said "it may be said that it is a question for the jury in each case whether the prisoner was justified by the circumstances in making use of his musket, and if this were a jury trial I should submit that question to them . . . . but as I would, acting in (that) capacity, set aside a conviction if a verdict of guilty were rendered, I shall assume the responsibility of directing his discharge."

This court, either sitting as a committing magistrate or by virtue of its supervisory jurisdiction over the proceedings of all subordinate tribunals (Gosline v. Place, 32 Pa. 520) has the authority and the duty on habeas corpus in favor of a pris-

oner held on a criminal charge, to see that at least a prima facie case of guilt is supported by the evidence against him. In the relator's case the facts presented by the evidence are undisputed and on them the law is clear and settled. If the case was before a jury we should be bound to direct a verdict of not guilty and to set aside a contrary verdict if rendered. It is therefore our duty now to say that there is no legal ground for subjecting him to trial and he is accordingly discharged.

The relator, Arthur Wadsworth, is discharged from further custody under the warrant held by respondent.

Peter Adams Paper Company *v.* Cassard, Appellant.

Husband and wife—Powers of married woman.

In Pennsylvania every restriction imposed by the common law upon the capacity of a married woman to contract has been removed except in two cases; she cannot become accommodation indorser, maker or guarantor or surety for another; she cannot without her husband joins convey or mortgage her real estate.

Husband and wife—Principal and surety—Conflict of laws—Affidavit of defense.

Where a statement of claim and an affidavit of defense show that the contract upon which suit was brought was made constructively at least, in New York, and that it was a contract of suretyship by a wife for her husband's debt, and there is nothing to show what was the law of New York on the subject, the court will assume the wife's disability in New York the same as in Pennsylvania, and will discharge a rule for judgment for want of a sufficient affidavit of defense.

Argued Jan. 9, 1903. Appeal, No. 207, Jan. T., 1902, by defendant, from order of C. P. No. 5, Phila. Co., March T., 1902, No. 3505, making absolute rule for judgment for want of a sufficient affidavit of defense in case of Peter Adams Paper Company v. Linda R. Cassard. Before MITCHELL, DEAN, FELL, BROWN, MESTREZAT and POTTER, JJ. Reversed.

Assumpsit on a contract of suretyship.

The facts appear by the opinion of the Supreme Court.

Error assigned was order making absolute rule for judgment, for want of a sufficient affidavit of defense.

Franklin Swayne, for appellant.

Charles F. Stilz and *Humbert B. Powell*, for appellee.

Opinion by Mr. Justice Dean, May 18, 1903:

Plaintiff brought this suit against defendant to recover $3,077.76 which amount was an indebtedness of her husband, Henry L. Cassard, for which she had become surety. The husband had purchased for himself from the paper company certain quantities of paper on credit. Before shipping the paper the wife delivered to the company this writing:

"September 9th, 1898.

"Peter Adams Paper Company,

"New York City.

"Gentlemen: In consideration of your selling your paper to Harry L. Cassard, I agree to be responsible for all paper sold to him to the extent of three thousand dollars, the guarantee to continue until notice to the contrary.

"Yours very truly,

"Linda R. Cassard.

"Lindamore, Charles St. Ave., Baltimore, Md."

After receipt of this writing plaintiff delivered paper to the husband and charged the same to him on its books, the account running to December 1, 1899, at which date the wife wrote to the company offering to pay $322.26 cash on the account and for the balance to give eleven notes jointly with her husband, each payable one month after date. She did pay the cash but the notes were never given.

This suit was then brought against the wife, this defendant, for the balance. The statement avers that the said contract was duly received and accepted in New York and that the paper was furnished the husband; that defendant gave no notice withdrawing from her contract of suretyship; that plaintiff sold to the husband relying on the contract of the surety; that afterwards in New York she made the payment of $322.26 in cash and promised to deliver the notes before referred to, which promise she wholly failed to keep.

The defendant made affidavit of defense, averring, that she is a citizen of Pennsylvania residing in Philadelphia with her husband; that the letter creating the suretyship was written by her husband and signed by her at his request; that no part of the indebtedness was hers but was wholly the husband's and that this was well known to the plaintiff when it received the writing; that the wife received no value whatever in consideration of the contract. Thereupon, plaintiff took a rule for judgment for want of a sufficient affidavit of defense. Afterwards upon hearing, the court below made the rule absolute and we have this appeal by defendant.

It is very clear that if this contract had been made in Pennsylvania the wife would not have been bound because of contractual incapacity. By our act of 1848 and the many acts since, every restriction imposed by the common law upon the capacity of a feme covert to contract has been removed except in two cases: 1. She cannot become accommodation indorser, maker or guarantor or surety for another. 2. She cannot without her husband joins, convey or mortgage her real estate. The act of 1893, the latest act on the subject, relieving the wife from contractual disability, expressly make these two exceptions. These exceptions have been fully sustained by this court, in Patrick v. Smith, 165 Pa. 526, and in Wiltbank v. Tobler, 181 Pa. 103. Both hold that under the act in the two instances noted, the married woman in the first has no power whatever to contract, and in the second she has no power unless in the express mode pointed out by the act of assembly.

But it is evident from the record that this contract, at least constructively, was made in New York; its enforcement only is sought in the courts of Pennsylvania. The general rule is, "that the validity of a contract is to be determined by the law of the state in which it is made, and not by the law of the state in which it is sought to be enforced." What then is the statute of New York as to the power of a married woman to contract? No power more unrestricted than that of Pennsylvania is averred in the statement; she avers her coverture; her disability is at once established. A statute exempting her from the disability must be averred; on hearing of the rule to show cause, the court could then peruse it and determine, but without the averment it could not do even this at this stage of

the case. It may be this contract is entirely good in New York, the place where it was made; if so the plaintiff must aver and prove it, otherwise the court will presume the wife's disability is the same in New York as here. We do not determine the extent of this married woman's liability in either fact or law, we only decide that on a suit in Pennsylvania there was not sufficient on this record for the court below to determine it on a rule for judgment for want of a sufficient affidavit of defense.

We think the affidavit of defense was sufficient as against the statement filed. The judgment is therefore reversed, that such further proceedings may be had in the court below as to right and justice appertain.

Marshall, Appellant, *v.* Pilots Association.

Voluntary association—By-laws—Amendment of by-laws—Vested right—Pilot's association.

When the rights of a member of a beneficial association have become fixed they cannot be affected by a change of the by-laws without his consent.

A voluntary association of pilots adopted the following by-law: "A member losing his license for any other cause than intoxication shall receive half pay until reinstated." A member in active service and good standing became disabled by reason of impairment of his eyesight, and could no longer pursue his calling. His license was revoked and he was accorded half pay. Subsequently the by-law was amended so that it would read, "A member losing his license through accident to the vessel, or through any other cause, except intoxication, shall receive one half pay until reinstated. A member losing his license for not being capable of following his business shall receive fifty dollars per month." *Held*, that the disabled member was not bound by the amended by-law.

Argued Jan. 21, 1903. Appeal, No. 121, Jan. T., 1902, by plaintiff, from judgment of Superior Court, Oct. T., 1901, No. 119, affirming judgment of C. P. No. 1, Phila. Co., Dec. T., 1900, No. 909, on case stated in case of James W. Marshall v. The Pilots Association for the Bay and River Delaware. Before MITCHELL, DEAN, FELL, BROWN, MESTREZAT and POTTER, JJ. Reversed.

Appeal from Superior Court.

The facts appear by the opinion of the Supreme Court, and by 18 Pa. Superior Ct. 644.

Error assigned was in affirming judgment of court of common pleas.

Edgar J. Pershing, with him *Horace G. Knowles*, for appellant.

Henry Flanders, of *Flanders & Pugh*, for appellees.

Opinion by Mr. Justice Mitchell, May 18, 1903:

The plaintiff was a member of the defendant association in good standing down to the time of his disability. He had contributed his due share of earnings to make up the relief fund of the association down to that time, and in return was entitled to the benefits whatever they might be which were provided by the constitution and by-laws of the association. These constituted the contract which governed the rights of the parties respectively and when plaintiff's rights to a special benefit accrued according to such contract, they became fixed and thereafter could only be changed by mutual consent. Whatever the duty of plaintiff might be as a general member with no special rights vested, to acquiesce in changes of the by-laws made in conformity with the charter or constitution, his status changed as soon as he had acquired special rights under the by-laws as they stood at the time. Thereafter as said in Becker v. Berlin Beneficial Society, 144 Pa. 232, "he was a creditor whose rights had previously attached, and those rights cannot be swept away by such a scheme as this by-law."

The by-law as it was when plaintiff became disabled provided that "a member losing his license for any other cause than intoxication shall receive half pay until reinstated." This classed all losses of license together, except those from intoxication. It made no other distinction between causes, whether fault or misfortune, negligence, wilful disobedience of regulations or unavoidable disability, nor any distinction between consequences, whether the loss of license was temporary or lasting. Such being the rule of the contract at the

time of the revocation of the plaintiff's license, the cause not being intoxication was immaterial, and plaintiff became entitled to half pay until reinstated, whether that was soon or never. When subsequently the association chose to alter its by-laws in order to differentiate disabilities and class them as temporary or permanent with different results in regard to benefits, it could not affect the rights of plaintiff already vested. However binding in future cases, such change was inoperative and a nullity as affecting plaintiff.

The case of Becker v. Berlin Beneficial Society, 144 Pa. 232, already cited, is express and controlling authority in this state, and is moreover in entire accord with the general current of American decisions.

Judgment reversed and record remitted to the court of common pleas with directions to enter judgment for the plaintiff on the case stated.

Schrader *v.* Beatty, Appellant.

Master and servant—Payment—Presumption—Housekeeper.

The rule that there is a presumption that domestics are regularly paid, weekly, biweekly or monthly, according to the custom of the locality in which they render services to their employers, has no application when the head of the house assumes relations of intimacy with his servant, and takes a girl employed by him out riding, and by what he says and does indicates an intention to marry her. In such a case, the strict rule applicable to purely business relations cannot be invoked by the master, for the intimacy of his personal relations with his servant necessarily involves him in laxity in his business relations with her.

Argued Feb. 2, 1903. Appeal, No. 141, Jan. T., 1902, by defendant, from judgment of Superior Court, Oct. T., 1901, No. 179, reversing judgment of C. P. Montgomery Co., March Term., 1900, No. 148 in case of Emma Elizabeth Schrader v. James Beatty, Administrator of Samuel R. Beatty, Deceased. Before MITCHELL, DEAN, BROWN, MESTREZAT and POTTER, JJ. Affirmed.

Appeal from the Superior Court.

The facts appear by the opinion of the Supreme Court, and by the report in 19 Pa. Superior Ct. 212.

Error assigned was the judgment of the Superior Court.

Montgomery Evans, with him *John Eckstein Beatty*, *John M. Dettra* and *James B. Holland*, for appellant.

N. H. Larzelere, with him *Gilbert Rodman Fox* and *M. M. Gibson*, for appellee.

Opinion by Mr. Justice Brown, May 18, 1903:

Judgment was entered for the defendant by the court below, non obstante veredicto, because it was of opinion that the presumption that the plaintiff had been paid by the decedent in his lifetime had not been overcome. On appeal to the Superior Court, the judgment so entered was reversed, and the judgment there was for the plaintiff on the verdict, because that court was of opinion that sufficient evidence had been submitted to the jury to justify their finding that the presumption had been overcome that the plaintiff had been paid, and for the additional reason that "upon the testimony her personal relations to the decedent can scarcely be regarded as those of a servant conclusively presumed in first instance to have received periodic payments during her employment." On this appeal we will consider only the question whether the relations of the appellee to the deceased were of such a character as to take the case out of the general rule that the wages of servants are presumed to be regularly paid.

The plaintiff's claim, as set forth in the statement of her cause of action, is for services rendered as housekeeper for the decedent, and if the evidence submitted showed that they were those simply of housekeeper, and that she sustained no other relation to the decedent, the judgment of the court below would have to be sustained under the authority of Taylor v. Beatty, 202 Pa. 120, where our Brother Mestrezat, speaking for all of us, said: "It is the character of the services rendered and not the term applied to the person performing them that determines whether or not she is a servant within the rule that a servant's wages are presumed to be paid periodically. It is

immaterial that the employee is called a housekeeper. That term does not definitely define the duties of the servant, nor is its meaning sufficiently certain to exclude extrinsic evidence as to the services actually performed by the employee. One of the standard English dictionaries defines a housekeeper to be 'a woman who oversees the work and servants in a house, either as a mistress or as an upper servant.' As said by Mr. Justice PECKHAM in delivering the opinion of the court in Edgecombe v. Buckhout, 146 N. Y. 332,* 'Generally speaking, we know that the term housekeeper has reference to services performed in the taking care of a house in connection with the inmates residing therein, but exactly what special and particular duties are to be regarded as embraced within the term must almost always be decided by the duties which are actually performed under the agreement as made.'"

According to the testimony submitted to the jury, the relation of this plaintiff to the decedent was different from that sustained by him to Sarah Jane Taylor, the appellant in the case referred to. In charging the jury, the learned trial judge instructed them that, in determining the question whether the presumption had been overcome that the plaintiff had been paid, they should take into consideration the relations that existed between her and the decedent. He said among other things: "What were their relations? How did he treat her? What did he think of her?" In the same connection he called attention to the testimony that the decedent contemplated marrying her, one witness having testified that he said: "She will be all right some day anyhow. She will be mine." While we will not impair, but always enforce, the rule that there is a presumption that domestics are regularly paid, weekly, biweekly or monthly, according to the custom of the locality in which they render services to their employers, it can have no application when the head of the house assumes relations of intimacy with his servants, taking a girl employed by him out riding into the parks, and, by what he says and does, indicates an intention to marry her. In such a case, the strict rule applicable to purely business relations cannot be invoked by the master, for the intimacy of his personal relations with his serv-

* Also reported in 46 N. E. Repr. 991. Reporter.

ants necessarily involves him in laxity in his busineas relations with them. An illustration of the truth of this is found in the present case. Instead of paying the plaintiff regularly, there must have accumulated in the hands of the decedent at one time the sum of $93.00, which he paid for a set of furniture for her. The testimony of B. D. Block as to this is: "Mr. Beatty came to our store to select some furniture and looked all around. We did not have anything to suit him. He said he wanted a solid mahogany set. I offered to go to the factory in Philadelphia with him. I went to see him in Conshohocken. He then called Miss Schrader. He said it was Lizzie's, she was buying it. He and Miss Schrader and I went to Philadelphia and selected a set. I sent the bill to Mr. Beatty and he paid it. It was $93.00. The bill was dated November 25, 1896." At another time the decedent paid $100 to a physician for professional services rendered to the plaintiff.

The finding of the jury having been in favor of the plaintiff, we must assume that they not only believed the testimony as to the relations between her and the deceased, but that the intimacy was of such a character as to overcome the presumption that she had been paid. The instruction of the learned trial judge should have been, not that the jury might regard the relations between the parties as sufficient to overcome the presumption of payment, but that, if the testimony was believed, the case was taken out of the rule that the master is presumed to regularly pay his servants at stated periods. This rule is for the protection of a master and his estate, and is never relaxed when the relation between him and his employee are those purely of master and servant; but, when he establishes and maintains new and different relations to his servant during the continuance of the service, he himself takes his case out of the rule. There is no longer any reason for its application. The presumption that servants are regularly paid naturally arises from the general custom of regularly paying them at stated periods, when the relations between them and their employer are of the ordinary character of master and servant. The servant, as a rule, needs his money as he earns it, and the master knowing this, as a rule, pays him weekly or monthly. If he does not so pay without demand from the servant, the presumption is that the demand is made and that the master then pays.

But when, as in this case, a man makes a companion of the girl or woman in his employ, and, by what he says and does, indicates an intention to marry her, it is not natural that either he or she should longer regard the relations between them as of a strictly business character, involving prompt and regular payment for the services rendered. The freedom between them soon becomes freedom in their business relations, and the .presumption of regular payments and settlements disappears. In affirming the judgment of the Superior Court, we repeat what we said in Ranninger's Appeal, 118 Pa. 20: "The presumption of payment which might ordinarily arise in the case of a domestic servant would not, we think, be applicable in such a case."

The judgment of the Superior Court in favor of the plaintiff on the verdict for $1,316.60 is affirmed, which judgment will bear interest from March 25, 1901.

Lansdowne *v.* Citizens Electric Light and Power Company, Appellant.

Boroughs—Ordinance—Resolution—Electric lighting—Electric light company—Contract—Estoppel.

Where an electric light company makes an offer to a borough for the public lighting, stipulating the time within which the offer is to be accepted, and the borough accepts the offer before the expiration of the time specified, and thereafter the company takes certain steps as if to carry out the contract, the company is bound by a valid contract with the borough, and it is immaterial that the borough between the date of the offer and the time of the acceptance advertised and received bids for the public lighting.

If an ordinance of a borough authorizes the borough council to make contracts for the lighting of the borough, the action of council in accepting a bid is merely ministerial, and not such an enactment, regulation, general law or ordinance as must be recorded in the borough ordinance book and advertised under the Act of April 3, 1851, P. L. 320, or the Act of May 23, 1893, P. L. 113. If objection is made that the resolution accepting the bid was not valid because there was no ordinance authorizing the contract, the burden is upon the person making the objection to prove the non-existence of the ordinance.

Where a resolution of a borough council accepting the bid of an electric light company contemplates the execution of a formal contract, and

the company sends a form of agreement acceptable to the borough solicitor, and the latter promptly prepares the agreement as desired by the company and delivers it to the general manager of the company, the agreement is binding upon the company, although not executed by it.

Argued Feb. 9, 1903. Appeal, No. 70, Jan. T., 1902, by defendant, from judgment of C. P. Delaware Co., Dec. T., 1899, No. 170, on verdict for plaintiff in case of Lansdowne Borough v. Citizens' Electric Light & Power Company. Before MITCHELL, DEAN, BROWN, MESTREZAT and POTTER, JJ. Affirmed.

Assumpsit on a contract for lighting a borough.

The facts are stated in the opinion of the Supreme Court.

Verdict and judgment for plaintiff for $2,300. Defendant appealed.

Errors assigned were various rulings on evidence and instructions.

J. B. Hannum, for appellant, cited Jones v. Schuylkill Light, Heat & Power Co., 202 Pa. 164; Com. ex rel. Pa. Globe Gas Light Co. v. Buchanan., 6 Kulp, 217; Waln v. Philadelphia, 99 Pa. 330; Fuller v. Scranton, 2 Cent. Repr. 788; Kepner v. Com., 40 Pa. 124; Orr's App., 67 Pa. 195; Brown v. Finney, 53 Pa. 373.

Lewis Lawrence Smith, with him *Fred. Taylor Pusey*, for appellee, cited: Seitzinger v. Edison Electric Co., 187 Pa. 539; Ephrata Water Co. v. Ephrata Borough, 16 Pa. Super. Ct. 484; Sandy Lake Boro. v. Gas Co., 16 Pa. Superior Ct. 232; Amberson Ave., 179 Pa. 634; Shiloh Street, 165 Pa. 386; Harrisburg v. Shepler, 7 Pa. Superior Ct. 491; Grier v. Homestead Borough, 6 Pa. Superior Ct. 542; Ridley Park v. Citziens' Electric Light & Power Co., 9 Pa. Superior Ct., 615.

OPINION BY MR. JUSTICE BROWN, May 18, 1903:

On July 7, 1899, the Citizens' Electric Light and Power Company submitted a written proposal to the borough of Lansdowne to light the town for a term of five years for $6.00 per lamp per year. The proposal was to be good until the 30th of the following September. The next day, July 8,

the borough advertised for bids for lighting, and, on July 14, the appellant and the Lansdowne Electric Company each submitted a bid, the former offering to furnish light at $8.00 per lamp per year for five years, and the latter at $13.00 per lamp per year for the same period. Neither of these bids was accepted, and, on July 18, by a resolution of the council of the borough, the contract for lighting was awarded to the appellant at its bid of July 7. On July 22 the company was notified of the borough's acceptance of its bid. The proposal of July 7 by the appellant and the acceptance of it on July 18 by the appellee formed what the latter alleges is the contract for the breach of which it is entitled to recover damages.

The first contention of the appellant is, that, as the borough advertised for bids on July 8—a day after its bid had been submitted—and, on July 14, received bids from it, and the Lansdowne Electric Company, it cannot now be held by the borough to its bid of July 7. At any time after the bid of July 7 was made the appellant could have withdrawn it: Vincent v. Woodland Oil Co., 165 Pa. 402; but, until withdrawn, it was open to acceptance by the borough until September 30. In the meantime it was the right of the borough to inform itself by advertising for bids, or in any other way, whether it ought to accept the appellant's bid of July 7. By taking steps to so inform itself, the appellant was not prejudiced, and, if it was not satisfied with the course pursued by the borough in advertising for bids, it had the right to withdraw its proposal. But it did not do so, and it did not regard the borough's advertisement for proposals as a refusal to entertain its bid. On the contrary, its conduct from July 22—the day it was notified that its bid had been accepted—down almost to the last day of September, clearly indicates that it not only had not withdrawn its proposal, nor intended to do so, but had regarded the same as accepted by the borough and binding upon it. It located the poles on the streets, and, on September 20, returned to the borough a draft of the contract which had been prepared by the borough solicitor and sent to it, and in which it made certain changes. The statement of the general manager of the company, in the letter returning the paper, was: "Find herewith contract with changes made, which leaves it acceptable to us. Please hurry the contract so that there will be no time lost

in furnishing you with light. Contract with changes as noted has been approved by our vice-president." As appellant is estopped from making its first objection, nothing further need be said about it.

The second reason assigned by the appellant why it is not liable to the appellee is, that, as there was no ordinance in existence providing for the lighting of the borough and authorizing the making of contracts from year to year, or at stated periods, its bid for lighting the streets, accepted by a resolution of council which was signed by the burgess, but not recorded and advertised, did not establish a contract between them. If there was an ordinance authorizing the council to make contracts for the lighting of the borough, the action of council in accepting the bid of appellant was merely ministerial, and not such an enactment, regulation, general law or ordinance as must be recorded in the borough ordinance book and advertised under the Act of April 3, 1851, P. L. 320, or the Act of May 23, 1893, P. L. 113. If the resolution was purely ministerial, then, as was said in Seitzinger v. Edison Electric Company, 187 Pa. 539, the "only ground of attack upon it is the alleged omission to record it in the ordinance book and to duly advertise it. We have carefully examined and considered all the Pennsylvania cases cited by the appellant in support of his contention pertaining to the resolution, and have failed to discover in them any warrant for it. It is a contention which overlooks the fact that the passing by a borough council of a resolution awarding a contract for lighting streets is not a legislative, but a ministerial act 'in the nature of a business transaction relating to municipal affairs of the borough:' Millvale Boro., 162 Pa. 374; Shaub v. Lancaster City, 156 Pa. 362; Straub v. City of Pittsburg, 138 Pa. 356; Howard v. Borough of Olyphant, 181 Pa. 191." A different rule is not found in Jones v. Schuylkill Light, Heat & Power Company, 202 Pa. 164. But, even if the appellant, as one of the parties to the contract, could question the validity of the resolution (which we need not decide) because it had not been passed in pursuance of a general ordinance, there was no proof of the non-existence of such an ordinance. The assault upon the resolution is made by the defendant as a technical defense to the borough's claim, founded on a contract apparently regularly entered into, and

the burden was upon it to show affirmatively wherein the resolution was invalid: Prell v. McDonald, 7 Kan. 426; City of Atchison v. King, 9 Kan. 550. The assignments in support of the second objection are dismissed.

It is clear that the resolution of July 18 contemplated the execution of a formal contract in writing between the borough and the light company, and, if it was not executed because there was a dispute between the parties to it as to the terms and conditions to be incorporated in it, or the borough's officers wilfully refused to sign it, the appellant's third and last reason why it should not pay for its default might prevail. There had been a dispute as to what some of the terms and details of the written contract should be, but finally there was a distinct understanding as to just how the agreement should be written. The company, through Samuel Haigh, its general manager, on September 20, 1899, sent to the borough solicitor the form of an agreement, as already stated, which was acceptable to him. The borough solicitor promptly prepared the agreement with the changes in it desired by the company, and, in a day or two, it was delivered to Mr. Haigh the general manager, but it was not executed by his company. And yet because it was not executed is one of the reasons now given by the company for not being bound by it. When the copy, with the changes made in it, was sent by the appellant to the borough solicitor, it was the final proposal of the company, and, when it was accepted by the borough in the exact form that the company wished, it became the agreement between them, no longer open to objection or exception, which the general manager wished to make when he met a representative of the borough at the Union League. As the case was properly tried and submitted to the jury, we need say nothing more than that the judgment on the verdict is affirmed.

Pittsley, Appellant, *v.* King.

Contracts—Parties—Joint obligation—Corporation.

Wherever an obligation is undertaken by two or more, or a right given to two or more, it is the general presumption of law that it is a joint obligation or right. Words of joinder are not necessary for this purpose; but, on the other hand, there should be words of severance, in order to produce a several responsibility or a several right. Whether the liability incurred is joint, or several, or such that it is either joint or several at the election of the other contracting party depends (the rule above stated being kept in view) upon the terms of the contract, if they are express.

Whether the liability of covenantors is joint, or several, or both, depends exclusively upon the words of the covenant. The language of severalty or joinder is the test. The covenant is always joint unless declared to be otherwise.

Where the plaintiff by an instrument in writing agrees to build, equip and complete for 186 defendants, "a milk condensory plant," for the agreed price of $42,000, and the price so agreed upon is to be paid by the defendants who are also to furnish the land on which the plant is to be built, the contract is a joint obligation of defendants, and it is immaterial that in the same paper the defendants agreed to become incorporated for the purpose of conducting the milk condensory, where it appears that the total subscription to the stock of such corporation in the paper was less than the contract price of the condensory and that thirty-six of the defendants subscribed to no stock at all but merely set opposite their names the number of cows whose milk would be furnished by them to the condensory.

Argued Feb. 23, 1903. Appeal, No. 259, Jan. T., 1902, by plaintiffs, from judgment of C. P. Lackawanna Co., Nov. T., 1901, No. 669, on demurrer to statement in case of Henry E. Pittsley, trading as Sayre Lumber Company, to use of J. Hibbs Buckman and O. L. Haverly, Trustees, v. F. M. Young, E. K. Atherton et al. Before DEAN, FELL, BROWN, MESTREZAT and POTTER, JJ. Reversed.

Assumpsit on a contract to furnish and equip a milk condensory. Before EDWARDS, P. J.

The facts appear by the opinion of the Supreme Court.

Error assigned was in sustaining demurrer to statement.

J. Hibbs Buckman, of *Hopple & Buckman* and *Michael J. Mar-*

tin, of *O'Brien & Martin*, for appellant.—A contract which imposes its obligation in its entirety upon two or more persons on the one hand or confers the right upon two or more on the other hand is a joint contract: Noyes v. Barnard, 15 U. S. App. 527; New Haven & Northampton Co. v. Hayden, 119 Mass. 361; Rider Life Raft Co. v. Roach, 97 N. Y. 378.

It is not within the province of the court to place upon the contract a construction at variance with the plainly expressed intention of the parties whether the contract be reasonable or not: Pottsville Mutual Fire Ins. Co. v. Minnequa Springs Imp. Co., 100 Pa. 137; Singerly v. Thayer, 108 Pa. 291.

Everett Warren, of *Willard, Warren & Knapp*, for appellees.—The contract was several: Riddle v. Stevens, 2 S. & R. 537; Price v. Grand Rapids & Ind. R. R. Co., 18 Ind. 137; Davis v. Shafer, 50 Fed. Repr. 764; Davis v. Belford, 70 Mich. 120 (37 N. W. Repr. 919); Davis & Rankin Bldg., etc., Co. v. Barber, 51 Fed. Repr. 148; Davis v. Booth, 10 Ind. App. 364; Davis v. McKinney, 11 Ind. App. 696; Frost v. Williams, 2 South Dak. 457; Gibbons v. Bente, 51 Minn. 499; Gibbons v. Grinsel, 79 Wis. 365 (48 N. W. Repr. 255); Davis, etc., Mfg. Co. v. Cupp, 89 Wis. 673; Davis, etc., Co. v. Murray, 60 N. W. Repr. 437; Davis v. Ravenna, 67 N. W. Repr. 436.

Opinion by Mr. Justice Brown, May 18, 1903:

On March 31, 1900, Henry E. Pittsley, trading as the Sayre Lumber Company, entered into a contract with F. M. Young and 185 other individuals or firms for the erection of a milk "condensory." This suit was brought by the appellants, as the use plaintiffs, to recover from the 186 defendants, jointly, the balance due on the contract price for the building and equipment of the plant and for extra work done and materials furnished. Demurrers were filed to plaintiffs' statement by different defendants, all, however, on the same ground, that the contract was several and not joint. The court below, having been of opinion that there was no joint liability, entered judgment for the defendants on their demurrers, and from it we have this appeal.

The first clause of the contract is: "It is hereby agreed between the Sayre Lumber Company, of Sayre, Pa., party of the

first part, and the other subscribers hereto as party of the second part. That the first party is to build, equip and complete in good running order for said second party within four months from the date hereof, a Milk Condensory Plant, according to plans and specifications hereto attached, at Clark's Summit, State of Pennsylvania, County of Lackawanna, on land provided by said second party for the agreed price of forty-two thousand dollars ($42,000), which is to be paid as follows: Seven thousand dollars ($7,000) when the building is completed; ten thousand dollars ($10,000) when boilers and engines are set and pumps and can-making machinery are delivered in building; ten thousand dollars ($10,000) when the copper works and all machinery is delivered in building; ten thousand dollars ($10,000) when all machinery is set and arranged in position ready to start; the balance, five thousand dollars ($5,000) sixty days from the starting of said plant. This sixty days time is given on the final payment, as a guarantee that the factory is complete and to demonstrate that the first party has fully discharged his part of this contract and the machinery is all new and first class, and of the character, quality and capability for which it is intended and recommended. And if said trial should discover or develop any flaws, defect or mistake in the construction or equipment of said plant, said first party shall have the right to correct such errors or mistakes within a reasonable time after the discovery of the same. Such errors or mistakes shall be corrected, as quickly as is practical, and with as little obstruction as possible to the continuous running of said plant. It is understood and agreed that the second party is to furnish the land on which to build the said plant, and the water on said land ready to attach the pumps, and to provide all needed tilling, sewerage or drainage, at their own expense, from beyond fifty feet outside of building, if needed, aside from the price of plant named in the contract, and within thirty days from the date of this contract, the second party shall provide the first party with a written or printed description of the land with permit to build thereon, free from all incumbrances or liabilities." That the obligation imposed upon and assumed by the appellees by this clause is joint, is too plain for discussion. Party of the first part agreed to build, equip and complete for the parties of the second part "a

milk condensory plant" for the agreed price of $42,000. The price so agreed upon was to be paid by the parties of the second part, who were also to furnish the land on which the plant was to be built. They were not to pay aliquot parts of the contract price, nor to furnish aliquot portions of the land; but, jointly, they were to pay the sum agreed upon, and, jointly, to furnish the land needed. "Wherever an obligation is undertaken by two or more, or a right given to two or more, it is the general presumption of law that it is a joint obligation or right. Words of joinder are not necessary for this purpose; but, on the other hand, there should be words of severance, in order to produce a several responsibility or a several right. Whether the liability incurred is joint, or several, or such that it is either joint or several at the election of the other contracting party depends (the rule above stated being kept in view) upon the terms of the contract, if they are express:" 1 Parsons on Contracts, page 11. "It is a general presumption of law, when two or more persons undertake an obligation, that they undertake jointly. Words of severance are necessary to overcome this primary presumption. In all written contracts, therefore, whether the liability incurred is joint or several, or joint and several, is to be determined by looking at the words of the instruments, and at them alone. The subject-matter of the contract, and the interests of the parties assuming a liability, have nothing to do with the question. It may be otherwise with respect to the rights of the covenantees, where there are more than one. There are not wanting cases in which it has been held that when the interests of the covenantees are several, they may sue severally, though the terms of the covenant upon which they sue are strictly joint. Even this, however, has been doubted. But, however it may be with the rights of covenantees, it is a settled rule that whether the liability of covenantors is joint, or several, or both, depends exclusively upon the words of the covenant. And the language of severalty or joinder is the test. The covenant is always joint, unless declared to be otherwise: Enys v. Donnithorne, 2 Burrows, 1190; Phillips v. Bonsall, 2 Binn. 138;" City of Philadelphia v. Reeves, 48 Pa. 472.

Of the above-quoted clause in the contract the learned judge said: "The first clause of the contract, standing alone, with

the bare signatures of the Sayre Lumber Company and the defendants, would undoubtedly make the undertaking a joint one;" but he was of opinion that, taking the contract as a whole, the intention of the parties, as gathered from it, was that it was several and not joint, and that each of the parties of the second part should be bound only to the extent of his subscription to the capital stock of a proposed corporation. The clauses in the agreement from which he interpreted the contract as a whole to be several are as follows: "For the purpose of forming a corporation to own and operate said factory and fully carry out the intention of the subscribers, it is hereby agreed that when this contract is closed, second parties are to incorporate under the laws of the State, limited corporation stock, nonassessable, fixing the aggregate amount of capital at not less than the amount subscribed, divided into shares of one hundred dollars each, or according to the laws of the State, which are to be issued to subscribers in proportion to their paid-up interests in said factory; and it is understood and agreed that the by-laws shall provide that one half a cent a can toll shall be set aside as a fund and declared and paid to shareholders as dividend on stock, and shall be paid for no other purpose. And it is further agreed by and between all the subscribers for stock that the producers of milk are to receive all its product brings, less the actual cost of canning, packing, marketing, etc., after one half a cent a can has been declared as a dividend. In consideration of the above, all agree that all their milk shall be furnished to said condensory. For a full and faithful performance of our respective parts of this contract, we bind ourselves and our successors."

The intention of the parties of the second part to the agreement evidently was that they would become incorporated for the purpose of conducting the "milk condensory" under corporate management. One hundred and fifty of the one hundred and eighty-six subscribed for stock, amounting in the aggregate to $40,600. The remaining thirty-six subscribed for no stock at all, but set opposite their respective signatures the number of cows whose milk presumably they agreed they would furnish to the "condensory." Of the one hundred and fifty who agreed to take stock some also made the same apparent agreement as to milk. Instead of making their incorpora-

tion the subject of an independent agreement, they put it in the shape of an appendage, to their contract with the Sayre Lumber Company; but, though so appended, it is independent of that contract and is a separate and distinct agreement of the parties relating to a different matter. The only reference in this appended agreement to the contract with the Sayre Lumber Company is for the purpose of fixing the time when the subscribers would become incorporated. Without reference to the contract price which they agreed they would pay for their plant, they agreed to become incorporated with a capital not less than the amount of their subscriptions, which amounted to only $40,600, or $1,400 less than they had agreed to pay for their plant. In this respect, as well as in others, the present case differs from the following, relied upon by the learned judge in support of the judgment entered: Davis & Rankin Building and Manufacturing Co. v. Jones, 32 U. S. App. 32; Davis & Rankin Building and Manufacturing Co. v. Barber et al., 51 Fed. Repr. 148; Davis v. Belford, 70 Mich. 120;* Davis & Rankin Building and Manufacturing Co. v. Murray, 102 Mich. 217;† Gibbons v. Grinsel, 79 Wis. 365;‡ Davis v. Ravenna Creamery Co., 48 Nebr. 471.§ We have examined each of these cases, and whether they were correctly decided or whether the contrary view, as expressed in Davis v. Shafer, 50 Fed. Repr. 764, was the correct one, we need not determine; for, in all of them, the agreement to incorporate was part of the agreement for the erection of the plant. In each case the agreement was that when the contract price for the plant had been subscribed for, the subscribers would become incorporated, with a capital stock not less than the amount of their aggregate subscriptions as found after their signatures to the agreement for the erection of the plant; and the opinion of the court in each case was, that it was manifest, from the face of the contract for the erection of the "condensory" or creamery, part of which was the agreement to become incorporated, that the intention of

* Also reported in 37 N. W. Repr. 919.
† Also reported in 60 N. W. Repr. 437.
‡ Also reported in 48 N. W. Repr. 255.
§ Also reported in 67 N. W. Repr. 436.
—Reporter.

the parties was that the amount each should pay for the erection of the building should be limited to the amount of his subscription. In each case after the name of each of the parties appeared the amount of stock that he had subscribed for in the proposed corporation. There were no parties to any of those agreements who did not agree to subscribe for stock. In the present case the amount of stock subscribed for is less than the contract price that the parties agreed to pay for the plant, and thirty-six of them have not subscribed for any stock at all, but opposite each name appears a specified number of cows. The milk of the cows would be of use to the "condensory;" but neither the milk nor the cows were what Pittsley agreed to receive for what he furnished to the parties of the second part, nor were they what the said parties agreed to pay. He was to get $42,000 in money, and yet, under the view expressed by the learned court below, if each subscriber is limited to the amount of his subscription, instead of receiving $42,000, the appellants cannot collect more than $40,600; and, if the several liability is to be enforced against the remaining parties to the agreement, cows or milk are all that the appellants can recover from them, for nothing else appears opposite the signatures of thirty-six who signed the agreement to pay $42.000 in money.

This judgment was on a demurrer, and all that we now decide is, that, on the face of the contract, as set forth in the statement, the liability of the appellees is joint. The present judgment, relieving them from liability in this joint action against them, is reversed, and the demurrers are overruled, with leave to plead.

Dives *v.* Fidelity and Casualty Company of New York, Appellant.

Insurance—Accident insurance—Employer's insurance—Application—Schedule.

An employer's accident policy contained this provision: "This policy does not cover loss from liability for injuries as aforesaid to, or caused by, any person unless his wages are included in the estimated wages here-

inafter set forth and he is on duty at the time of the accident in an occupation hereinafter described at the place or places mentioned in the schedule." The application for the policy contained the following : "The estimated pay roll does not include the wages paid by subcontractors." Before the application was signed the word "not" in the item was stricken out, and the answer written was "yes." The schedule attached to the policy contained the exact words of this item, except that in the schedule the word "not" was not stricken out. The answer "yes" was written after the item in the schedule the same as after the item in the application. *Held*, that the wages of an employee of a subcontractor were included in the estimated wages, and that if the insured was compelled to pay damages for injuries to such an employee, he could recover on the policy.

Insurance—Accident insurance—Pleading.

In an action on two contractors' liability policies of accident insurance, where the plaintiffs declare in separate counts upon each of the two policies, under the one claiming that the person injured was their employee, and under the other that he was not, and the defendant pleads without objection to the declaration, the court commits no error in refusing defendant's motion made at the beginning of the trial "that the plaintiffs be directed to elect on which of the two counts of the declaration they would proceed."

Argued March 2, 1903. Appeal, No. 225, Jan. T., 1902, by defendant, from judgment of C. P. Berks Co., Aug. T., 1901, No. 56, on verdict for plaintiff in case of Josiah Dives and George S. Pomeroy, trading as Dives, Pomeroy & Stewart, v. Fidelity and Casualty Company of New York. Before MITCHELL, DEAN, FELL, BROWN, MESTREZAT and POTTER, JJ. Affirmed.

Assumpsit on policies of insurance against contractor's liability for accidents. Before ENDLICH, J.

The facts are stated in the opinion of the Supreme Court.

Verdict and judgment for plaintiff for $2,097.07. Defendant appealed.

Errors assigned were (1) in refusing motion to compel plaintiffs to elect on which of the two counts of their declaration they would proceed; (4) in entering judgment on the verdict on a point reserved.

Cyrus G. Derr, with him *Edwin A. Jones*, of *Nadal & Carrere*, for appellant.

Jefferson Snyder, of *Snyder & Zieber*, with him *A. K. Stauffer*, for appellees, cited: Grandin v. Rochester German Ins. Co., 107 Pa. 26, Haws v. Fire Assn. of Phila., 114 Pa. 431; Duffield v. Hue, 129 Pa. 94, as to the effect of the written words.

Opinion by Mr. Justice Brown, May 18, 1903:

When about to erect a store building in the city of Reading, the appellees applied to the appellant, a casualty company, for insurance against loss for injuries sustained by employees and others during the erection of the building. Two applications were made by the insured and two policies were issued in pursuance of them. The company had two forms of policies, one known as the "Contractors' Employers' Liability Form," and the other as the "Contractors' Public Liability Form." The policies issued to the appellees were in these respective forms.

In the opinion of the court, directing judgment to be entered for the plaintiffs, it was properly said: "The plaintiffs were not, strictly speaking, 'contractors,' but owners. In order, however, to obtain the insurance they desired conformably to the practice of the defendant company, they signed an application for a policy in each of the two forms—in each application declaring that the estimated pay roll did include wages paid by subcontractors and giving at the same figures both the estimated average number of persons to be employed and the estimated pay roll, which admittedly included all workmen to be employed by contractors, except those concerned with the erection of certain iron work already contracted for. . . . Indeed it would seem that the common sense as well as legally correct treatment of this case requires that the two policies issued to plaintiffs be regarded as constituting part of, and as intended formally to evidence one single and entire transaction, the substance and effect of which were to obtain and afford insurance against liability for injury to all persons who should have occasion lawfully to be in or about the building in the course of its construction and exposed to any of the dangers incident thereto, and fairly within the language of either policy, and who, in case of injury, would have a right of action against the plaintiffs. That is what the plaintiffs sought from and in their applications proposed to the defendant company. That

is what they paid for. That is what, upon a broad and reasonable view of the situation of the parties and of the obvious purposes they were providing for, and also upon a fair construction of the policies tendered to and accepted by the plaintiffs, they had a right to believe they had obtained. And that, therefore, is what the defendant ought to be held to, upon the familiar and enlightened principle, that, so long as courts of justice are called upon to administer contracts, they must be expected to administer them as nearly as may be according to the very intention and understanding that were present in the minds of the parties when they made them: Barnhart v. Riddle, 29 Pa. 92, 97." The learned judge, however, was of the opinion that the plaintiffs were entitled to recover on the first, or "Contractors' Employers' Liability Form" of policy, and in this he was manifestly correct.

Clause B of the policy is: "This policy does not cover loss from liability for injuries as aforesaid to, or caused by, any person unless his wages are included in the estimated wages hereinafter set forth and he is on duty at the time of the accident in an occupation hereinafter described at the place or places mentioned in the schedule." From this it is clear that the defendant company itself defined the persons who were to be regarded as "employees" under the terms of the policy, for the clause cannot be read otherwise than that any person whose wages were included in the estimated wages set forth in the schedule was, for the purpose of the protection intended by the policy, to be considered as an "employee" of the insured, no matter what may be the strict and literal meaning of the word when standing alone. Turning to the estimated total annual wages set forth in the schedule, they are found to be $10,000, and the estimated average number of employees seventy-five. These items, incorporated by the insurance company in its policy, are taken totidem verbis from the application upon which the policy was issued.

Paul Albert, who was injured and for whose injuries the appellees paid him, was actually employed by Burkhart Brothers, who had the contract for doing the brickwork. Item 8 in the blank application presented to the insured was as follows: "The estimated payroll does not include the wages paid by subcontractors." Before the application was signed, the word "not"

in this item was stricken out, and the answer was "yes." We have, then, the application stating distinctly that the wages paid by subcontractors were included in the estimated wages given to the insurance company, and, in unmistakable language, the intention of the insurer, as found in clause B of its policy, was, that it included every employee who, under subcontractors, was helping to erect the building.

To avoid this plain covenant to indemnify the insured from loss arising from injuries sustained by Paul Albert, the insurance company points to item 8 of the schedule in the policy, which, with a single exception is in the exact words of item 8 of the application. The exception is, that in the schedule the word "not" is not stricken out, and the contention of the appellant is, that, as the answer "yes" appears in that item, the insured represented to the company that the estimated payroll did not include the wages paid by subcontractors.

Whether the insurance company, in undertaking to embody the application in its exact words in the policy failed, intentionally or otherwise, to strike out the word "not" in item 8 of the schedule, is immaterial, for the only sensible interpretation to be put upon that item in the schedule, which must be regarded as a question and answer, is, that the insured said to the insurer that the estimated pay roll did include wages paid by the subcontractors. "Yes, the estimated payroll does include the wages paid by subcontractors." The professional or lay mind would read this as the only intelligent answer given and intended to be given to the question, and, to say the least, it is an unwarranted play upon the word "yes" to give it, in the connection in which it is used, the import asked for by the insurer. Item 8 in the application literally and distinctly states that the estimated pay roll includes the wages paid by subcontractors; item 8 in the schedule does the same in a slightly different form, for both express what was testified to by John E. Lewis as having been "clearly understood" by him and the representative of the insurance company at the time the application was signed. We need only add that the court below, in entering judgment for the plaintiffs, simply read the application and the policy issued in pursuance of it as they were written.

The first assignment of error is, that the court below re-

fused defendant's motion, made at the beginning of the trial, "that the plaintiffs be directed to elect on which of the two counts of the declaration they would proceed." In the statement of the questions involved on this appeal, we are not asked to consider the one raised by this assignment, and, as it does not seem to be seriously pressed in the printed argument, we overrule it. We could give no better reason for doing so than the following, taken from the opinion of the court below in entering judgment on the verdict: "They [the appellees] had declared separately upon each of the two policies held by them, under the one claiming that the person injured was their employee, and under the other that he was not. It may very well be that this method of stating their case was not in perfect accord with the requirements of the Practice Act of May 25, 1887, P. L. 271. But defendant had without objection pleaded to the declaration and indeed was raising no question as to its propriety in form or substance, and there seemed to be no reason why, in fairness to defendant, the discretion to compel an election, if still exercisable, should be then exercised; nor is there any reason apparent now for supposing that any harm may have been done by the refusal to exercise it. If the defect were such as to forbid a judgment for plaintiffs in the case, that circumstance would have been taken advantage of by a motion in arrest of judgment: Sidwell v. Evans, 1 P. & W. 383, 387."

Judgment affirmed.

Kane's Estate.

Will—Probate—Issue devisavit vel non—Testamentary capacity—Undue influence.

In an issue devisavit vel non where the testimony of the counsel who drew the will and the physician who attended the testator at the time, is positive as to testamentary capacity, there is a prima facie case which requires very strong evidence to offset.

In such cases the testator's actions and conduct of his business are of far more weight than the opinions of medical experts or the gossip of neighbors.

Evidence discussed and held insufficient to justify submission to jury.

Argued March 10, 1903. Appeal, No. 197, Oct. T., 1902, by Ursula Breen, from decree of O. C. Allegheny Co., Nov. T., 1900, No. 168, dismissing appeal from register of wills in estate of Michael C. Kane, deceased. Before MITCHELL, DEAN, BROWN and MESTREZAT, JJ. Affirmed.

Appeal from register of wills admitting will to probate.
The facts are stated in the opinion of the Supreme Court.

Error assigned was the decree of the court.

William B. Rodgers, with him *William LeGoullon* and *A. M. O'Brien*, for appellant.

Johns McCleave, of *Watson & McCleave*, for appellee.

OPINION BY MR. JUSTICE MITCHELL, May 18, 1903:

The member of the bar who wrote the testator's will had known him well as a client and otherwise for many years. He testified clearly and positively to the circumstances, how testator came to the court room in search of him and finding him occupied waited until lunch time, went then with him to his office, talked awhile about other matters of mutual interest and then gave directions for his will. The will was written and executed there, witnessed by Mr. McKenna and a student in his office. Being asked about an executor, testator named his brother Patrick, the beneficiary, and to a question whether he had said anything to Patrick about the will, replied that he had not, he wanted to surprise him. McKenna's testimony was positive that he saw no impairment of testator's mind, nor any change from what he had always seen in him.

It further appeared in the undisputed evidence that the testator had been in business for many years, at first and for the larger part of the time with his brother, but afterwards by himself, and had accumulated a moderate fortune, chiefly during the later years when he had conducted a separate business by himself without even the aid of a clerk. This continued down to the date of the execution of the will.

On the other hand it was conceded that the testator died in May, 1900, insane. The will was made September 21, 1896,

and it was shown that on September 19 he had had a congestive attack which he called a rush of blood to the head and which was variously described by others as apoplexy, an "apoplectiform attack," a "stroke," and "a slight stroke." He recovered and returned to his business on September 19, made his will on September 21 as already related, and continued in discharge of his business until October 1, when he had another and more severe attack of the same kind, and subsequently others which terminated in his admitted insanity in the summer of 1897. The crucial inquiry here is upon the state of his mind on September 21, 1896, when he made his will. Dr. Ayres the physician who attended him for the attack of September 11, 1896, had attended his niece in the same house a year previously and had been his physician from that time. He testified that the testator's mental condition was "perfectly normal" by September 16 or 17, so that no further visits to the patient's house were necessary, and that he had "made a complete recovery."

Other witnesses, including two physicians, business men with whom he dealt, neighbors and others, all of whom had known the testator for some years, gave testimony to business and personal relations with him and to his entire mental competency down to and including September, 1896.

The contestant on the other hand produced four medical witnesses, as to testator's mental condition. The first was a graduate of 1899 who did not see the testator until the fall of 1899 when he was brought to the hospital, another attended him in the summer of 1897 until the arrival of Dr. Ayres, his regular physician, and the last, called in rebuttal, never saw him at all and testified only in answer to suggested hypothetical questions. All three must be considered only as experts, testifying to deductions from conditions long subsequent to the date of the will, which they had observed or had had stated to them. The real burden of the medical testimony for the contestant was borne by Dr. Kearns. This witness who had known the testator many years testified to having prescribed for him as early as 1881, and gave in considerable detail the nature of the disease, its progress and its anticipated result. Without dwelling on particulars they are summed up in the assertion of this witness that the testator had "incipient dementia" as far back as 1882. The testimony does not commend itself by

clearness or consistency but accepting it for its face value it is deprived of substantial weight by proving too much. A dementia so "incipient" that it allowed the sufferer to continue in business for fourteen years and by his own exertions accumulate a fortune before any business associate or acquaintance suspected a want of mental capacity may present an interesting medical problem, but may be safely disregarded in a legal inquiry into his testamentary competency.

Besides this medical testimony a large number of other witnesses were produced as to failure of memory, peculiarities of action, etc., on the part of testator, from which they inferred want of mental capacity. Most of them were women who gave no indication of knowing what testamentary capacity is and whose testimony was mostly the tattling neighborhood gossip which is usually so plentiful in cases of this kind. A regiment of such witnesses should be outweighed by the clear, positive and intelligent testimony of men who knew what they were talking about, such as the scrivener who wrote the will and the physician who attended the testator in his illness shortly preceding.

As already said the crucial question here is the condition of the testator's mind at the date of the will. All testimony on other points is relevant and material only so far as it bears on this. The direct, clear and positive testimony as to the circumstances attending the making of this will is convincing. The draftsman of a will, especially if a lawyer or conveyancer, is always an important and usually the most important witness in the case, and where as here he had known the testator well for a long time and shows such circumstances of voluntary and intelligent action by testator at the time, his testimony makes a prima facie case that requires very strong evidence to offset.

The only evidence in this case which could raise a reasonable doubt of testamentary capacity prior to the making of the will, is the congestive or apoplectic attack on September 11. Without that the loose gossip about failing memory, etc., would not stand a moment's consideration. But the physician who attended the testator in that illness, and was in a position to know more about it than a dozen theoretical experts or talkative neighbors, testified positively that the testator made a "complete recovery" before the date of the will, and all the

circumstances confirm the accuracy of the diagnosis. Against the testimony of Mr. McKenna and Dr. Ayres alone, even if it were not supported as it is by business men and others as to the actual dealings of the testator, the evidence against the will would not be sufficient to sustain a verdict.

The question of undue influence scarcely requires comment. The beneficiary was the testator's only surviving brother; they had lived together in the same house for forty years, including even the year of testator's married life; and they had been in partnership through adversity and through success for more than half that time. Such relations of blood and association are naturally productive of affection and of testamentary remembrance, but they do not warrant the inference of undue influence. The circumstances of the making of the will affirmatively disprove any exertion of undue influence on the part of the beneficiary at that time, and the few trifling acts of assistance or even of direction to the testator as to making change, etc., in the store, fall far short of establishing any continuing influence of the beneficiary which even in his physical absence controlled the mind of the testator: Miller v. Oestrich, 157 Pa. 264.

Decree affirmed at costs of appellant.

Kelley *v.* Shay, Appellant (No. 1).

Equity—Parties—Cross bill—Partnership.

Where on a bill in equity between partners for an accounting, the plaintiff admits a debt due by the partnership to a third person, but such debt is denied by the defendant, and the alleged creditor becomes a party defendant by intervention and by notice, and in the accounting the debt is established, the court may enter a decree in favor of the intervening creditor without any cross bill ever having been filed by him.

The general rule which requires a defendant to file a cross bill when seeking to enforce his rights, does not apply in cases of accounting where a balance is found due to the defendant, nor in cases where there are adverse interests between the co-defendants.

Partnership—Dissolution of partnership—Distribution in specie.

The general rule that upon the dissolution of a partnership, it is the right of each partner to have the partnership property converted into

money by a sale, does not apply where the circumstances of the parties would give to one an advantage in the bidding. In such a case if all the debts are paid, the court may divide the property in specie.

Argued March 3, 1903. Appeal, No. 162, Oct. T., 1902, by defendant, from decree of C. P., Washington Co., No. 986, on bill in equity in case of H. A. Kelly v. John W. Shay, Greensboro Natural Gas Company and S. F. McCaulley. Before MITCHELL, DEAN, BROWN, MESTREZAT and POTTER, JJ. Affirmed.

Bill in equity between partners for an accounting. Before TAYLOR, J.

The facts are stated in the opinion of the Supreme Court.

Error assigned was the decree of the court.

A. M. Todd, and *John C. Bane*, with them *George A. Jenks*, for appellant.—Under the pleadings in the case, McCaulley is not entitled to any relief whatever; he being a defendant, and his claims all being for original, affirmative, substantive relief against the partnership of Shay & Kelley, and against Shay, individually, he is not, in the absence of a cross bill, entitled to a decree in his favor: Freeland v. South Penn Oil Co., 189 Pa. 54; McCune v. Lytle, 197 Pa. 404; Duryee v. Linsheimer, 27 N. J. Eq. 366; McConnel v. Smith, 23 Ill. 611; Mason v. McGirr, 28 Ill. 322; Norman v. Hudleston, 64 Ill. 11; Smith v. Wolfolk, 115 U. S. 143 (5 Sup. Ct. Repr. 1177); 2 Daniell's Chancery Pleading, 1550.

In the absence of a special agreement to the contrary, the right of each partner on a dissolution, is to have the partnership property converted into money by a sale: Wild v. Milne, 26 Beavan, 504; Featherstonhaugh v. Fenwick, 17 Vesey, 298; Crawshay v. Maule, 1 Swanston, 495; Sigourney v. Munn, 7 Conn. 11.

A. Leo Weil, with him *John W. Donnan*, *David Sterrett* and *Chas. M. Thorp*, for appellee.—The defendant may have a decree in his favor without a cross bill in cases of specific performance and in cases of accounting if a balance is found due to the defendant: Freeland v. South Penn Oil Co., 189 Pa.

54; Corcoran v. Chesapeake, etc., Canal Co., 94 U. S. 741; Vance v. Evans, 11 W. Va. 342; Elliott v. Pell, 1 Paige's Ch. 263; Allen v. Baugus, 1 Swan. 404; Ingram v. Smith, 1 Head. 411; Henshaw v. Wells, 9 Humphreys, 567; Vanderveer v. Holcomb, 17 N. J. Eq. 87.

While the general rule is that the property of the partnership shall be sold and the proceeds distributed, yet, where the debts have all been paid and the assets remaining are capable of absolutely equal division, such division may be made; where equal division can be made and one of the partners demands and the other objects to such division, if the court finds that great injustice, inequality, wrong and oppression would be occasioned by selling instead of dividing the property, and that no injury will be occasioned by dividing, then the court is compelled out of regard for equity and good conscience to divide the stock, instead of ordering its sale: Featherstonhaugh v. Fenwick, 17 Vesey, 298; Harper v. Lamping, 33 Cal. 641; Pierce v. Covert, 39 Wis. 252; Shearer v. Shearer, 98 Mass. 107.

Opinion by Mr. Justice Potter, May 11, 1903:

This bill is filed for an accounting of partnership transactions, and for the appointment of a receiver. The bill avers and the answer admits that a partnership, under the firm name of John W. Shay, was formed between Shay and Kelley in the spring of 1891 for the purpose of drilling oil and gas wells by contract in Washington county, Pennsylvania. The partnership continued until its dissolution by defendant Shay on November 27, 1897. During the existence of the partnership each member was at liberty to engage in the business of leasing lands and producing oil upon his own account, and each of them availed himself of this privilege. In conducting the business of the firm, Kelley was the outside man, and did the field work, while Shay was the financial man, and the managing partner, and took the contracts, collected and paid out the money, and kept the books. Shay and Kelley were also partners with others in similar operations in West Virginia and in Greene county, Pa., the Greene county leases having been negotiated by one McCaulley under an agreement by which he was to have an interest in the leases. Shay alleges

that at three different periods during the existence of the partnerships, final settlements to their dates were made between the partners, and balances shown were paid, and receipted for by the plaintiff. But the court below finds that, without fraud or wrongful intent upon Shay's part, very serious and extensive errors were made in the keeping of the accounts, which warranted the disregarding of the intended settlements, and entitled Kelley to an accounting for the entire period of the partnership. The court suggested, however, that it be "along the lines of the defendant's accounting heretofore, in order that from the books and accounts kept of the business between them there may be pointed out errors and items of debit and credit and explained in the various accounts, and the recollection of the parties concerned refreshed from them." He therefore appointed James I. Brownson Jr., Esq., as assessor, to call before him the parties, with their account books, vouchers and papers from which, and from the testimony to be taken, he was to state an account; and, in order to facilitate the taking of the testimony, he was, by agreement of all concerned, appointed an examiner, for the purpose of administering oaths and taking the depositions of witnesses. The assessor proceeded most thoroughly and diligently with the duties of his appointment, and after much patient investigation and careful consideration, filed a clear, methodical and able account and, thereafter, the assessor having filed his report, and exceptions thereto having been filed by both parties, and additional testimony having been taken before the court, after argument by counsel, and due consideration, the court entered a final decree, dismissing most of the exceptions, and confirming the report, as modified in certain particulars. The decree sets forth, inter alia, that certain shares of the capital stock of the Greensboro Natural Gas Company, standing in the name of John W. Shay and subscribed for by him, and purchased with partnership property, are the property of the partnership of Shay & Kelley, and are subject also to the interest of S. F. McCaulley therein. The interests of the several parties are further defined by the decree, and the gas company is directed to issue certificates of stock to the parties entitled thereto, upon payment of the balances yet due. It is argued here under the assignments of error filed upon behalf of the appellant Shay, that the defendant McCaulley was not entitled under the pleadings to affirmative relief

in the absence of a cross bill. He was not an original defendant. It was found upon preliminary hearing, that McCaulley claimed an interest in the partnership and in the property in controversy; and the appellant Shay moved to dismiss the bill for these reasons. The court below refused, but ordered the case to stand over until McCaulley should be brought upon the record. Upon notice and service of the bill, to which his name had been added as defendant by an amendment duly allowed, McCaulley appeared and filed what was termed an answer, but which in effect was a petition to intervene. Upon final hearing it was found that the partnership owed money to McCaulley, and that he was also entitled to certain shares of stock of the Greensboro Natural Gas Company, which were held by the receivers of the partnership. The court directed that the money should be paid, and the certificates of stock should be delivered to McCaulley. This is the extent of the affirmative relief granted to him, and of which appellant complains. It was no more than would have been required if McCaulley had not been a party to the bill. The indebtedness of the partnership to him must have been ascertained and paid, before the partnership affairs could be wound up and the assets distributed. It was not the awarding of an amount claimed by both partners or by neither. Kelley admitted McCaulley had a claim, but did not know the amount: Shay denied it altogether. Before Kelley's interest in the partnership could be ascertained, McCaulley's claim must be determined.

The method pursued simply made McCaulley a party to the adjudication and bound him by the result. To the general rule which requires a defendant to file a cross bill when seeking to enforce his rights, there is a well recognized exception in cases of accounting where a balance is found due to the defendant. Thus in Freeland v. South Penn Oil Co., 189 Pa. 54, after citing the rule, Justice FELL, delivering the opinion of the court, thus continues: "There are some well recognized exceptions to this rule, where a defendant may have a decree in his favor without a cross bill, as on a bill for a specific performance where the defendant sets up in the answer and proves an agreement different from the one sought to be enforced; on a bill for accounting, if a balance is found due the defendant; and on a bill for partition where the defendant claims the same re-

lief as is sought by the original bill. These and other exceptions are very clearly stated in 5 Ency. of Pl. & Pr. p. 634." And in Langdell on Equity Pleading, sec. 159, page 184, after discussing the question as to the necessity for a cross bill, it is said: "So where the decision of a controversy between a plaintiff and two defendants raises an incidental and collateral question between the co-defendants, the court will sometimes dispose of the matter by means of a reference to a master and thus save the expense of a separate suit, and the same course has been taken where it was impossible to give the plaintiff the relief to which he was entitled without first deciding a question between the co-defendants: Hood v. Clapham, 19 Beav. 90–96; Duberly v. Day, 14 Beav. 9."

But there is another ground upon which the action of the court below, in this respect, may be sustained. The adverse interest here is between co-defendants, and as between themselves, defendants may have affirmative relief without a cross bill. In Beach on Mod. Eq. Pr. sec. 430, this rule is thus stated: "In chancery suits, where parties have been made defendants because they will not join as plaintiffs, who are yet necessary parties, it has long been settled that adverse interests as between co-defendants may be passed upon and decided, although they are not put in issue by the pleadings and no adversary proceedings are had; and if the parties have had a hearing and an opportunity of asserting their rights, they are concluded by the decree as far as it affects rights presented to the court and passed upon by its decree." And many authorities are cited to sustain the proposition. The partnership property was in the hands of the court, through its receivers, and was there for division and distribution. McCaulley claimed an interest in the property. The interests of the partners could not be determined until his claim was adjudicated. He appeared and submitted his interests to the court, and asked for its protection. And the court has by its decree, made with all parties in interest before it, defined the extent of McCaulley's interest, and was thereby enabled to determine the main controversy between the partners, and state the account between them. We see no error in its action in so doing. The court found as facts that both the partnership and McCaulley had interests in the lease upon the Gray farm, in Greene county,

Pa., and that Shay had exchanged that lease for stock in the Greensboro Natural Gas Company, and it therefore ordered Shay to turn over to McCaulley and to the partnership, their proportionate shares of the stock. This was manifestly right upon the facts, and we will not, of course, disturb the finding of facts by the court below.

The appellant complains, also, that the court having found that the partnership owned certain shares of the stock of the Greensboro Natural Gas Company, ordered the distribution of the said stock to be made in specie, instead of directing it to be sold and the proceeds divided. The general rule is, that upon the dissolution of a partnership, it is the right of each partner to have the partnership property converted into money by a sale. The reason for this course is, that it is generally the fairest way to proceed. But here the court has found that the partnership debts are all paid, and hence there is no need for money, and that further, in case of a sale of the stock, Shay would, from the circumstances of the case, have certain advantages over Kelley, so that, to use the language of the court, "these parties would not be upon an equality in bidding for the stock if it were put up for sale, and that it will be fairer and more just to give to each his proper share of the stock in specie if Kelley's proportion of the liability to the gas company is provided for." Equity and good conscience, therefore, require that in the present case, the stock should be divided in kind, rather than that it should be sold, and the proceeds divided.

The rule is generally the other way, because the fairest results are in most cases reached by a sale. But where as here, the reason fails, the rule must be honored in the breach, rather than in the observance.

The conclusions of law reached by the court below are warranted by the facts as found by him, and we are not convinced that the evidence fails to support in any particular his findings of fact. It follows that the specifications of error based thereon cannot be sustained. The thirteenth specification of error complains of the placing of the costs upon this appellant. Under the evidence, as a whole, we think they were properly imposed. The court below will, of course, protect the interests of the Greensboro Natural Gas Company in obeying its

order to transfer upon its books the shares of stock to the various parties entitled thereto.

The assignments of error are all overruled, the appeal is dismissed and the decree of the court below is affirmed.

Kelley, Appellant, *v.* Shay (No. 2).

Appeals—Findings of fact—Evidence.

A finding of fact in the court below as to the existence or nonexistence of a partnership, based upon sufficient evidence, will not be reversed by the Supreme Court in the absence of manifest error.

Partnership—Settlement of accounts—Interest.

In the settlement of partnership accounts the allowance or refusal of interest depends upon the circumstances of each particular case; any unbending rule would work injustice in some case.

Except where there has been a fraudulent retention, or an improper application of money of the firm, it is not the practice of the courts to charge a partner with interest on money of the firm in his hands.

Partnership—Right to engage in outside business.

Where a partner reserves to himself the right to engage in business upon his own account in the same line in which the firm is engaged, he may, after purchasing stock of a corporation in whose business the partnership is interested, and paying for the same out of partnership assets, buy with his own money stock of the same corporation.

Argued March 3, 1903. Appeal, No. 173, Oct. T., 1902, by plaintiff, from decree of C. P., Washington Co., No. 986, on bill in equity in case of H. A. Kelley v. John W. Shay, Greensboro Natural Gas Company, and S. F. McCaulley et al. Before MITCHELL, DEAN, BROWN, MESTREZAT and POTTER, JJ. Affirmed.

Bill in equity for an account.

[See Kelley v. Shay, Appellant (No. 1).]

Error assigned was the decree of the court.

John W. Donnan, with him *David Sterrett*, *A. Leo Weil* and *C. M. Thorp*, for appellant.

George A. Jenks, with him *John C. Bane* and *Todd & Wiley*, for John W. Shay.

Edwin S. Craig, with him *Andrew M. Linn*, for Greensboro Natural Gas Company.

Opinion by Mr. Justice Potter, May 11, 1903:

The assignments of error in this case are directed in the first instance against the action of the court below, in refusing to include in the order for an accounting, the transactions of the firm of J. W. Shay & Company. We consider the court's findings of fact as a sufficient answer to this complaint. It has found that the interest of Shay and Kelley respectively in the firm of J. W. Shay & Company were individual interests, and that the partnership of Shay & Kelley was not interested as a firm in the said firm of J. W. Shay & Company; and, further, that upon the sale of the property of Shay & Company and after the payment of all existing debts of the said firm, "the net balance was distributed and paid to the several members of the firm in proportion to their respective interests, and said firm was dissolved and its entire assets disposed of and paid out," with the exception of certain tools, cordage, etc., which were bought by Shay and Kelley respectively. If this finding is correct, it follows that Kelley is not now entitled to any further accounting from Shay for the business of J. W. Shay & Company. Neither do we see any substantial merit in the suggestion that Shay failed to account in accordance with the terms of the order of court, and that instead of so doing, he compelled Kelley to assume the burden of proof, and the expense of surcharging and falsifying the books and papers of Shay. The whole matter was referred to the assessor, to be thoroughly sifted and probed, and with full power to call for all accounts, books, vouchers and papers, so that he might make a complete and searching investigation. His report shows that he did so, and that the opposing contentions and claims of the parties were submitted, supported, and combated to the fullest extent. It is difficult to see how there could be any more thorough sifting of the facts, or how a more full and accurate investigation could be made. No complaint was made by the assessor of any refusal or failure upon the

part of Shay to produce books or accounts, or afford any and all information as to the affairs of the parties concerned, within his possession.

The assessor gave careful consideration to the question of the allowance of interest to Kelley upon the balance found to be due him from Shay, and we are not inclined to disturb the conclusion reached by him as confirmed by the court below. There is much confusion in the authorities as to what is proper in the allowance of interest in partnership accountings, and it can hardly be held that any fixed rule has been established. The state of the authorities is in fact, not such as to justify the deduction from them of any general principles upon this subject: Lindley on Partnership, *389. Except where there has been a fraudulent retention, or an improper application of money of the firm, it is not the practice of the court to charge a partner with interest on money of the firm in his hands: Lindley on Partnership, *391. In Brenner v. Carter, 203 Pa. 75, the following language was approved in the opinion of our Brother BROWN (p. 77). "The Pennsylvania rule on this subject was laid down by Mr. Justice SHARSWOOD in Gyger's Appeal, 62 Pa. 73. In the settlement of partnership accounts the allowance or refusal of interest depends upon the circumstances of each particular case; any unbending rule would work injustice in some case. And this rule has been frequently restated: Jones v. Farquhar, 186 Pa. 386." See also Carter v. Producers' Oil Co., 200 Pa. 579.

The disposition of the question of interest by the court below, seems to be, under all the circumstances of this case, equitable and just. There would be much force in the contention of Kelley as to his right in the stock of the Greensboro Natural Gas Company purchased by Shay with cash, if it were not for the agreement by which each partner reserved to himself the right to engage in business upon his own account.

The court below in its final opinion, puts it thus: "As we have found, it was a part of the terms of the partnership that Shay should be at liberty to engage in business, and take interests, in the same line in which the firm was engaged, on his own individual account. We therefore think that, after taking for the firm the stock which was issued in payment for the firm's half interest in the Gray lease, and holding for it the stock

which was paid for with the proceeds of the quarter interest sold to Craig, he was left at liberty by the terms of the partnership to subscribe on his own account, for a part of the other stock which was to be sold for cash. He did so without any objection on Kelley's part. No part of the funds of the firm can be identified as having entered into and paid for the stock so taken. We decide that the twenty-five shares last above specified belong to and are the individual property of John W. Shay."

With these conclusions we agree as we do with the final conclusion, that Shay's liability as a trustee for Shay & Kelley and McCaulley, is limited to 125 shares of the original stock, and a proportionate amount of the new issue.

The assignments of error are overruled and the decree is affirmed.

Kelley *v.* Shay (No. 3).

Argued March 3, 1903. Appeal, No. 174, Oct. T., 1902, by S. F. McCaulley, from decree of C. P. Washington Co., No. 986, on bill in equity in case of H. A. Kelley v. John W. Shay, Greensboro Natural Gas Company, and S. F. McCaulley et al. Before MITCHELL, DEAN, BROWN, MESTREZAT and POTTER, JJ. Affirmed.

OPINION BY MR. JUSTICE POTTER, May 11, 1903:

This appellant is entitled to one eighth of the stock owned by the firm of Shay & Kelley, in the Greensboro Natural Gas Company. The only question raised by this appeal is, as to the amount of that holding. As this has been determined by the decision in Kelley's Appeal, ante, pp. 208, 215, nothing further need be here added.

The assignments of error are overruled, and the decree is affirmed.

Richmond's Estate.

Will—Probate—Issue devisavit vel non—Testamentary capacity—Undue influence.

Where the physician who attended the testator, and the attorney who drew his will, both of whom had known the testator well, testify to his entire testamentary capacity, and it appears that he continued in the transaction of his regular business until two days before making the will, a case is established which can only be overcome by clear, definite, circumstantial and weighty evidence of facts not reconcilable with the possession of testamentary capacity.

The opinion of an expert with no personal knowledge of the testator, and which is given on a hypothetical case based on disputed facts, is of no weight on an issue devisavit vel non.

Argued March 16, 1903. Appeal, No. 93, Jan. T., 1902, by Frank C. Richmond, from decree of O. C. Lycoming Co., dismissing appeal from register of wills in estate of W. D. Richmond, deceased. Before MITCHELL, DEAN, FELL, BROWN and POTTER, JJ. Affirmed.

Appeal from register of wills admitting will to probate.

The facts appear by the opinion of the Supreme Court.

Error assigned was the decree of the court.

T. M. B. Hicks, for appellant.

Seth T. McCormick, for appellee.

PER CURIAM, May 18, 1903:

The testimony of the physician who had known the testator for twenty-five years, and who attended him in his last illness up to and including the making of the will, and that of the attorney who had also been his counsel previously and who drew the will in testator's presence, from instructions given him in person while the two were alone together, show convincingly that the testator was in full possession of his mental faculties and was exercising them under his own volition.

In addition to this the undisputed evidence is that the testator continued in the transaction of his regular business until two days before the making of his will.

A case so established can only be overcome by clear, definite, circumstantial and weighty evidence of facts not reconcilable with the possession of testamentary capacity. There is no such evidence in this case. The testimony on the part of contestant is mostly as to trifling peculiarities of action, such as increasing irritability, not answering questions (a not uncommon habit of silent and reserved men), and what some of the witnesses thought was a lack of attention to what he was doing. One expert of apparently high professional standing gave an adverse opinion as to testamentary capacity, but it was rendered worthless by the fact that he had no personal acquaintance with the testator, and the hypothetical case put to him was based largely on facts which were disputed.

The beneficiary was not in the house when the will was made, and it was shown affirmatively that he knew nothing of it or its provisions. He was the testator's business associate if not partner, and testator, who was a bachelor with no relatives in the city, had gone to his house on the suggestion of the doctor.

On the whole case no court could have permitted a verdict against the will to stand.

Decree affirmed at the costs of the appellant.

Mitchell *v.* Spaulding, Appellant.

Lunacy—Inquisition—Setting aside inquisition—Title to real estate.

Where a person proposing to purchase real estate finds the record of an inquisition of lunacy against the vendor set aside and vacated for patent illegality, he may safely purchase the real estate, and a subsequent reinstatement of the inquisition will not affect his title.

Lunacy—Sale of real estate—Notice to next of kin.

The Act of June 13, 1836, P. L. 592, gives to the court of common pleas jurisdiction to decree a sale of the real estate of an alleged lunatic after a return of an inquisition finding him to be insane ; but no such sale can be decreed unless notice of the intended application is given to the next of kin of the lunatic capable of inheriting the estate. If the next of kin is a minor, some one competent to represent him must be appointed. Service upon the father of the minor, who is not the guardian of the minor, nor of the blood of the alleged lunatic, is insufficient.

Whether a sale of real estate can be authorized while a traverse of the inquisition is pending questioned, but not decided.

A notice of only two days to a party in another state to appear and defend an adverse suit is no notice at all.

Infant—Suit against—Next friend—Guardian.

An infant defendant can only appear by a guardian, general or ad litem.

Argued March 16, 1903. Appeal, No. 205, Jan. T., 1902, by defendant, from decree of Superior Court, Jan. T., 1902, No. 41, reversing judgment of C. P. Bradford Co., Feb. T., 1899, No. 177, non obstante veredicto in case of Charles W. Mitchell v. Allen A. Spaulding. Before MITCHELL, DEAN, FELL, BROWN and POTTER, JJ. Affirmed.

Appeal from Superior Court.

The facts appear by the opinion of the Supreme Court and by the report of 20 Pa. Superior Ct. 296.

Error assigned was the decree of the Superior Court.

J. W. Stone, with him *Lee Brooks* and *W. C. Sechrist*, for appellant.

J. T. McCollum and *T. S. Hickok*, for appellee.

OPINION BY MR. JUSTICE MITCHELL, May 18, 1903:

The title of appellant rests upon proceedings by which the property of a man, not only living but present and contesting the right to interfere with him, was taken away from him without even a hearing. Such a title challenges close scrutiny.

It is true that the condition of one non compos mentis demands for his own sake that the judgment of others be substituted for his, and the law must provide even for the case of a prima facie appearance of lunacy. This the statute has done with great care and regard for the rights involved, and every requirement intended for their protection must be strictly observed: Bennett v. Hayden, 145 Pa. 586.

In the present case they were scarcely observed at all. The proceedings from their inception show most discreditable irregularities. The order of sale was improvidently made, the learned judge admitting in his opinion that the pendency of

the traverse was not brought to his knowledge and that if it had been the sale would not have been authorized. But notwithstanding the irregularity he felt himself compelled to hold that the court had jurisdiction to make the order and therefore that the purchaser took a good title. In this view the Superior Court did not concur, and we have now this appeal from its decision.

The order of sale was fatally defective for want of jurisdiction of the court to make it. The inquisition of lunacy at the time of the sale under it was void on its face. It was returned signed by only five jurors summoned by the sheriff. It had an additional signature but not that of any one known to the proceeding. The statute requires that there shall be not less than six jurors of those duly summoned. Nearly two years after the sale the inquisition was set aside by the court for this patent illegality. A few months later, however, it was reinstated and the return allowed to be amended upon affidavits that the superfluous name was really signed by a juror duly summoned and acting as one of the inquest, but that at the time he was so stupid, or drunk or careless that he wrote the signature B. J. Whitman instead of his own name, B. J. Davidson. The reason is not expressed in this exact phrase in the application to amend but this is the plain English of it. The facts are admitted. The right to make such an amendment upon the extraordinary story told and after that lapse of time may well be questioned. But it is not necessary to be determined now as it is clear that it could not be done to the prejudice of intervening rights, and this becomes material because the plaintiff bought during the interval. When plaintiff bought from Spaulding if he went to the record he found an inquisition of lunacy, a traverse, and then the inquisition itself set aside and vacated for patent illegality, and nothing to show that he would not get a clear title from his grantor. When the defendant bought at the committee's sale, on the contrary, he was bound to look at the record on which the validity of his title would depend, and if he did so he found an inquisition clearly illegal on its face, that gave the court no jurisdiction whatever to order the sale.

But the record shows a further defect of jurisdiction, and the one on which the Superior Court rested its decision. The

Act of June 13, 1836, sec. 24, provides that "no order for the sale of real estate shall be granted, unless it appear that due notice of the intended application was given to the wife, if any, and the next of kin of the lunatic capable of inheriting the estate." The giving of such notice is a jurisdictional fact which must appear affirmatively on the record. As was well said by the learned judge of the Superior Court, "This requirement is not merely directory; it absolutely prohibits the making of the order unless the provisions of the section have been complied with. The legislature, no doubt, recognizing the danger involved in the exercise of the jurisdiction which they conferred and the helplessness of the person whose property was to be sold, made the exercise of the power absolutely dependent upon notice to the next of kin, and, that there might be no mistake as to who were entitled to notice, defined the term "next of kin" as the persons "capable of inheriting the estate." This requirement involves no hardship; the person whose property is to be sold is incapacitated, and notice must be given to those who would inherit his estate if he died at that time. This is a safeguard against the abuse of power without full inquiry as to the facts. In Bennett v. Hayden, 145 Pa. 586, it was held that notice to the wife of the lunatic was not notice to the minor children, and no other notice appearing in the petition for leave to sell, the purchaser took no title as against the children who brought ejectment after the death of their father. In the present case the record showed upon its face that a minor son of Ella M. Phillips, a deceased sister of the lunatic, was one of the next of kin within the meaning of the statute and entitled to notice. The petition was presented, and the order of sale made the same day, October 2, 1896, and the petitioner recites, "that on the thirtieth day of September, 1896, he sent by registered letter notice of this intended application to be made on Friday, October 2, 1896, to Amarilla Griswold and Frank Phillips, father of an infant son of Ella Phillips."

A notice of only two days to a party in another state to appear and defend what is practically an adverse suit, is no notice at all. Even under the loosest construction it could not be held to be the "due notice" which the statute requires.

But insufficient as the notice was in point of time, it was not given to any proper person. The party entitled to notice

was the infant. Notice to the father was a nullity under the direct ruling in Bennett v. Hayden, supra. There is no evidence that he had assumed the position of next friend, and even if he had it would have been insufficient. An infant may sue by prochein ami, because all the risk he runs is that of being amerced for costs pro falso clamore suo, and costs the next friend assumes to pay for him. But as a defendant he incurs the risk of loss of part of his estate, and for that reason he can only appear by some one under the obligations and responsibility of a guardian, general or ad litem. An appearance by next friend is unauthorized: Swain v. Fidelity Ins., etc., Co., 54 Pa. 455; Troubat & Haly's Practice, sec. 2170.

The defects in the inquisition and in the petition for sale being thus apparent on the face of the record, and going directly to the jurisdiction of the court, the cases relied on by appellant as to collateral attack on the judgment have no applicability.

It was argued by appellee that pending the traverse the court had no jurisdiction to sell the real estate except in case of necessity which should appear as a fact in the proceedings. The language of section 13 of the act of 1836, defining the powers of the court while the traverse is pending, covers only the authority of "management and safe-keeping" of the estate, while the larger authority to sell for maintenance, or payment of debts is in subsequent sections. And notwithstanding general expressions in some of the cases that management must include the power of sale, no case has yet arisen in which the power to sell while a traverse is pending was involved or has been directly passed upon. As it is not necessary to do so now we express no opinion on it.

The judgment of the Superior Court is affirmed.

Spaulding, Appellant, *v.* Bullock.

Lunacy—Committee—Sale of personal property—Trespass.

Where the committee of a lunatic, pending the traverse of the return of the inquisition, sells personal property belonging to the estate of the lunatic, and subsequently files an account embracing the proceeds of the property, and the account is confirmed, and the balance shown by it dis-

tributed and paid out under the report of an auditor and the decree of the court, the alleged lunatic cannot after the finding of the inquisition is reversed, maintain an action of trespass against the committee to recover the value of the personal property sold.

Argued March 17, 1903. Appeal, No. 245, Jan. T., 1902, by plaintiff, from judgment of Superior Court Jan. T., 1902, No. 47, affirming judgment of C. P. Bradford Co., Dec. T., 1899, No. 241, non obstante veredicto in case of Hanford L. Spaulding v. Charles E. Bullock. Before MITCHELL, DEAN, FELL, BROWN and POTTER JJ. Affirmed.

Appeal from Superior Court.

The facts appear by the opinion of the Supreme Court and by the report in in 20 Pa. Superior Ct. 301.

J. T. McCollum and *T. S. Hickok*, for appellant.

J. W. Stone, with him *Lee Brooks*, for appellee.

OPINION BY MR. JUSTICE FELL, May 18, 1903:

The committee of the alleged lunatic was in lawful possession of his property, charged with the duty to manage it and to apply as much of the income thereof as should be necessary to the payment of debts and the support of the lunatic; and he was empowered in case the income was insufficient, to apply under the direction of the court as much of the principal of the personal estate as was necessary for these purposes. The power to use the principal necessarily implied the power to sell, and the only irregularity was in the failure of the committee to obtain an order of court for that purpose. The whole matter was in the control of the court, whose officer the committee was, and the subsequent ratification of his action gave to it the same validity that the previous authorization would have given. We agree with the view expressed in the opinion of the Superior Court, 20 Pa. Superior Ct. 301, that the approval and confirmation of the account of the committee by the court of common pleas was an adjudication that was conclusive on the plaintiff.

The judgment is affirmed.

De Long, Appellant, *v.* Delaney.

Negligence—Physicians—Malpractice.

In an action against a physician for negligence in failing to use a tourniquet after an accident, a nonsuit was properly entered where there is no evidence at all from any witness competent to express an opinion that a tourniquet should have been used, or that a tight bandage applied by defendant was not fully equivalent.

Argued March 18, 1903. Appeal, No. 38, Jan. T., 1903, by plaintiff, from order of C. P. Lycoming Co., Sept. T., 1902, No. 322, refusing to take off nonsuit in case of Mary A. De Long v. William E. Delaney. Before MITCHELL, DEAN, FELL, BROWN and POTTER, JJ. Affirmed.

Trespass to recover damages for negligence. Before HART, P. J.

The facts appear by the opinion of the Supreme Court.

Error assigned was the order of the court.

W. M. Stephens, for appellant.

Seth T. McCormick, with him *Frank P. Cummings*, for appellee.

PER CURIAM, May 18, 1903:

Plaintiff's husband had his leg badly crushed in attempting to board a railroad train near Cammal station, and defendant, a physician, was called in on the emergency to treat him. Defendant rendered the first aids to the wounded man, washed and dressed the wound, bandaged the leg, and then relinquished the case to the family physician, who was expected, and arrived by the same train on which defendant left. The injured man remained under the care of the family physician for about two hours and then was put on a train and taken to the hospital at Williamsport, where his leg was found to have bled profusely and where he died a few hours later from loss of blood. At the trial the plaintiff proved the foregoing facts, gave some

evidence that a tourniquet was an instrument in common use among physicians for stopping the flow of blood and that it had not been used by the defendant. Plaintiff then rested her case, and the court entered a nonsuit.

The negligence relied on by appellant is the failure to use a tourniquet. But there was no evidence at all, from any witness competent to express an opinion, that a tourniquet should have been used, or that the tight bandage applied by defendant was not fully equivalent, in short that there was any negligence shown. The jury could only have made an uninformed guess. Negligence cannot be found in that way.

Judgment affirmed.

Dailey *v.* Frey, Appellant.

Marriage—Evidence—Legitimacy—Partition.

On a bill for partition where the issue is the marriage of plaintiff's parents, a certificate of marriage is admissible as evidence of identity of parties, when offered in connection with testimony that it was produced from the custody of plaintiff's father and claimed by him as the certificate of his own marriage, and this is the case although the name of plaintiff's father was Sharpe, and the name mentioned in the certificate was Shaw.

On a bill for partition where the plaintiff's legitimacy is denied on the ground of a prior marriage of her mother, a finding in favor of plaintiff will be sustained where the evidence of a previous marriage had opposed to it the evidence of the reception of the parents of the plaintiff by her mother's family as married, the acknowledgment of the husband and the treatment of the plaintiff from her birth as a legitimate child, the entire absence of any appearance or question of the alleged first husband during the whole life of the alleged wife, the possibility of confusion as to two families of the same name, and finally the presumption in favor of innocence of the alleged bigamy.

Argued March 23, 1903. Appeal, No. 357, Jan. T., 1902, by defendants, from decree of C. P. No. 5, Phila. Co., Sept. T., 1901, No. 2107, on bill in equity for partition in case of Margaret Dailey, Guardian of Amelia Bradley Sharpe, a Minor, v. John Frey and Julia Frey, his Wife. Before Mitchell, Fell, Brown, Mestrezat and Potter, JJ. Affirmed.

Bill in equity for partition.

RALSTON, J., found the facts to be as follows:

The bill avers that Amelia Bradley Sharpe, born August 25, 1885, is the daughter of Frederick Sharpe and Margaret Bradley Sharpe (who was the daughter of Daniel Bradley), who were married on September 10, 1884; that Margaret Bradley Sharpe died on or about September 8; 1885, intestate, married, and leaving to survive her the minor, Amelia Bradley Sharpe, Daniel Bradley died on November 4, 1892, intestate leaving a widow, Ellen Bradley, three children, Julia Frey, Charles Harry Bradley and Elizabeth Bradley, and a grandchild, Amelia Bradley Sharpe, in whom his real estate vested. Charles Harry Bradley died on October 21, 1894, and Elizabeth Bradley died on February 21, 1894, both intestate, unmarried and without issue. Ellen Bradley, the widow, died on October 15, 1896. The bill prays for a partition of the real estate.

The answer denies that Frederick Sharpe was married to Margaret Bradley, and alleges that Margaret Bradley was married to Thomas McClain on May 22, 1883, and remained his lawful wife until her death.

The sole question to be determined is whether Frederick Sharpe and Margaret Bradley Sharpe were lawfully married as averred in the bill.

The complainant's counsel produced a marriage certificate, which had been given him by Frederick Sharpe. Amelia Bradley Sharpe testified that she had seen her father hand it to him. William Sharpe testified that Frederick, his brother, had shown him this same certificate in 1886 after the death of Margaret Bradley Sharpe. Mrs. Manship, the widow of the clergyman performing the ceremony, testified that her husband was dead; that the certificate was in his handwriting as was also a record kept by Mr. Manship which she produced. The certificate showed that Frederick Shaw and Margaret Josephine Bradley were married on September 10, 1884. Witnesses testified that Frederick Sharpe and Margaret Bradley Sharpe lived together; that shortly after the birth of Amelia Bradley Sharpe, Margaret returned to the house of her father, Daniel Bradley, where she died; that she was buried from her father's house as Mrs. Sharpe, Frederick Sharpe being present and recognized as her widower. The child remained in Daniel Bradley's family until the death

of Daniel and Ellen Bradley, and shared in the distribution of Daniel Bradley's personal estate. These facts are, in the opinion of the court, sufficient to establish the identity of the Frederick Shaw mentioned in the certificate, with Frederick Sharpe, and prove the marriage between Frederick Sharpe and Margaret Josephine Bradley.

The defense is that even if such a marriage was contracted it was void because the woman was, at that time, married to another man. To establish this, it was shown that on May 22, 1883, Thomas McClain was married to Maggie Bradley. There were several families of Bradleys living in the same neighborhood. No witnesses could identify the Maggie Bradley named in the certificate with Margaret Josephine Bradley, with the exception of Julia and John Frey, the defendants. They both testified that Margaret, Mrs. Frey's sister, had told them that she was married to Thomas McClain; that they had seen them together. The court thinks that the testimony is not sufficient to establish the marriage of Margaret Josephine Bradley with Thomas McClain, and thereby to annul the marriage of Frederick Sharpe with Margaret Josephine Bradley, and declare Amelia Bradley Sharpe to be a bastard.

The court finds that Frederick Sharpe and Margaret Josephine Bradley were lawfully married on September 10, 1884; that Amelia Bradley Sharpe, their daughter, is a legitimate heir to her grandfather, Daniel Bradley, and is entitled to share in his estate.

A decree will be entered as prayed for in the bill.

Error assigned was the decree of the court.

D. Webster Dougherty, for appellants.

Michael J. Ryan, for appellee.

PER CURIAM, May 18, 1903:

To a bill for partition of lands formerly of one Bradley between plaintiff's ward, a granddaughter of Bradley, and defendant, a daughter, the answer denied the legitimacy of the plaintiff. This was equivalent to a plea of non tenent insimul, and there being no other facts in dispute the judge, apparently by agreement, proceeded to determine the case on this single issue.

The defendant denied plaintiff's legitimacy on two grounds, first that her parents had never been married, and secondly that at the time of the alleged marriage the mother was the wife of another man. All the assignments of error go to the admission and weight of the evidence on these two points. Without discussing them in detail it is sufficient to say first that there was evidence enough to support the finding of a marriage between plaintiff's parents. The certificate of marriage, though not in itself evidence of that fact, was offered in connection with testimony that it was procured from the custody of plaintiff's father and claimed by him as the certificate of his own marriage. It was therefore within the principle of Hill v. Hill's Adm., 32 Pa. 511, and was admissible as tending to show the identity of the parties notwithstanding the variation in the name.

The second question is more difficult. There was considerable evidence of a previous marriage. But opposed to it was the evidence of the reception of the parents of the appellee by her mother's family as married, the acknowledgment of the husband and the treatment of the appellee from her birth as a legitimate child, the entire absence of any appearance or question of the alleged first husband during the whole life of the alleged wife, the possibility of confusion as to the two Bradley families, and finally the presumption in favor of innocence as to the alleged bigamy. The judge weighing all the evidence found the marriage of appellee's parents to be valid, and we have not been convinced that he was in error.

Judgment affirmed.

Rhymer *v.* Fretz, Appellant.

Nuisance—Public nuisance—Parties—Equity.

A public nuisance cannot be suppressed or enjoined at the suit of a private individual unless he has sustained some damage or injury which is clearly special to himself, and apart from that which the general public has sustained.

A private citizen cannot maintain a bill in equity to enjoin the enlarging of a frame building immediately opposite his residence, where the bill itself discloses that the neighborhood is of a residential character,

that the erection of the building would endanger the property in the vicinity from fire, and that the uses for which it was intended would deprive plaintiff and his neighbors from the full enjoyment and proper use of their property. In such a case the plaintiff to sustain his bill must allege an injury special to himself.

Argued March 27, 1903. Appeal, No. 350, Jan. T., 1902, by defendant, from decree of C. P. No. 1, Phila. Co., June T., 1902, No. 4511, on bill in equity in case of James L. Rhymer v. Tobias L. Fretz. Before MITCHELL, FELL, BROWN, MESTREZAT and POTTER, JJ. Reversed.

Bill in equity for an injunction. Before BREGY, J.

The facts are stated in the opinion of the Supreme Court.

Error assigned was the decree of the court.

George E. Nitzsche, with him *George F. Deiser*, for appellant.—If a nuisance, it must be either a public nuisance or a private one. Private citizens cannot come into a court of equity with a bill to restrain a public nuisance without averring special damages: Philadelphia & Gray's Ferry Pass. Ry v. Philadelphia, 2 W N. C. 639; S. C., 11 Phila. 358; Rhea v. Forsyth, 37 Pa. 503; Hieskell v. Gross, 7 Phila. 317.

James S. Clifford, for appellee, presented no paper-book.

OPINION BY MR. JUSTICE MESTREZAT, May 18, 1903:

James L. Rhymer, the plaintiff, owns and resides on the premises at No. 1732 North Front street, in the city of Philadelphia. Pursuant to an ordinance of the select and common councils of the city, approved November 8, 1892, granting him permission, Tobias L. Fretz, the defendant, erected a frame building to be used for religious purposes, on the lots at Nos. 1731 and 1733 North Front street, directly opposite the premises and residence of the plaintiff. By a subsequent ordinance, approved February 18, 1901, the ordinance of November 8, 1892, was amended so as to authorize Fretz to enlarge the frame building he had erected. After the defendant had begun the work, authorized by the amended ordinance, the plaintiff filed this bill against him as superintendent of Gospel Mission, 1731 and 1733

North Front street, to restrain him "from continuing the erection upon said premises of said frame structure." The bill avers that "since the erection of the original frame building upon the premises the Gospel Mission has been the resort of disreputable characters who congregate in the neighborhood and are a nuisance to the peace and safety of this neighborhood, various acts of nuisances have been committed within the past six months, and the frame structure has been partially diverted from its high religious purpose by the maintenance of a sawmill and wood yard, and for the purpose of operating the same, a boiler and engine are used." The reason assigned for the relief prayed for is found in the seventh paragraph of the bill and is "that the erection of said frame structure and the uses to which it is being put, viz: the working of a sawmill and wood yard and the operating of a steam boiler and engine will jeopardize the safety and endanger property in this vicinity from fire, and by reason thereof, together with the unlawful gathering of persons in the neighborhood will deprive himself (the plaintiff) and his neighbors of the full enjoyment and proper use of their property and home." The court below entered a decree "that a permanent injunction issue restraining the defendant from erecting the building authorized by the ordinance of 1901." The entry of this decree is the subject of the sixth assignment of error.

It is well settled law that a public nuisance cannot be suppressed or enjoined at the suit of a private individual unless he has sustained some damage or injury which is clearly special to himself and apart from that which the general public sustains. Mr. Wood in his work on Nuisances, section 646 (3d ed.), citing numerous authorities to sustain the text, states the rule as follows: "An individual, in order to be entitled to a recovery for injuries sustained from a public nuisance, must make out a clear case of special damages to himself, apart from the rest of the public, and of a different character, so that they cannot fairly be said to be a part of the common injury resulting therefrom. It is not enough that he has sustained more damage than another; it must be of a different character, special, and apart from that which the public in general sustain, and not such as is common to every person who exercises the right that is injured." In Mechling v. Kittanning Bridge Co.,

1 Grant, 416, LOWRIE, J., speaking for this court, said: "Private citizens have no right of action, either in law or equity, for the suppression of a public nuisance, unless on averring and proving some special damage to themselves. . . . For a nuisance that is merely a public wrong, only a public action can be brought, and that must be done by the proper public functionaries."

Applying this rule to the facts averred in the bill it is clear that the court below could not give the plaintiff the relief he seeks. His only complaint is that the erection of the building and the uses to which it will be put "will jeopardize the safety and endanger property in this vicinity from fire, and by reason thereof, together with the unlawful gathering of persons in the neighborhood, will deprive himself and his neighbors of the full enjoyment and proper use of their property and home." In this averment there is no allegation that by the construction and use of the building the plaintiff will sustain any damage special to himself, or that his property will be subjected to any other or greater danger than that of his neighbor. The danger from fire and the deprivation of the enjoyment and use of property are, therefore, as alleged in the bill, common to all the property and persons residing in the vicinity of the proposed structure. The anticipated injury or damage to the property of the plaintiff by the erection of the building will be the same in character and degree as that which will result to the property of every other person in the neighborhood. In fact there would be greater danger to the property on the same side of the street and immediately adjacent to the Mission building than to the residence of the plaintiff. As appears from the bill this "is a residential neighborhood of valuable private houses," and hence, the property in the entire neighborhood, being of the same character, will be jeopardized to the same extent and degree as that of the plaintiff which is his private residence. This is a fact not only averred in the bill but found by the learned trial judge in his fourth finding of fact as follows: "That the erection of a frame building in the location authorized by the ordinance of councils would increase the danger of fire to the residences and other buildings in the immediate neighborhood, including that of the plaintiff."

We are of opinion that the bill avers no facts showing any

danger or injury likely to result from the erection of the proposed structure which is special to the plaintiff and not common to all the property owners in the vicinity, and that, therefore, it was error to grant the injunction at the instance of the plaintiff restraining the defendant from erecting the building.

The sixth assignment of error is sustained, the decree is reversed, and it is ordered that the bill be dismissed at the cost of the appellee.

Ellwanger *v.* Moore, Appellant.

Attachment execution—Legacy—Decedent's estates—Acts of April 13, 1843, *P. L.* 233, *and April* 10, 1849, *P. L.* 619—*Trusts and trustees—Spendthrift trust—Charity—Intestacy—Execution.*

Where a testator leaves his estate under a spendthrift trust for his three sons, with survivorship amongst themselves, and upon the death of the survivor to a charity, and directs his executors to sell all of his estate and the testator dies within thirty days from the date of his will, and the charitable bequest thereby fails, an attaching creditor of one of the sons all being alive has no right to issue a fieri facias on his judgment and sell the undetermined and unascertained interest of one of the sons in the estate of the testator which accrued to him by the failure of the charitable bequest. In such a case the attaching creditor after he has secured his judgment against the garnishees, must pursue his remedy in the orphans' court. No writ of fieri facias or other writ of execution is necessary to carry into effect the purpose of the attachment and to make it available to the creditor.

Argued March 30, 1903. Appeal, No. 65, Jan. T., 1903, by trustees, from order of C. P. No. 2, Phila. Co., Sept. T., 1899, No. 3259, discharging rule to strike off writ of fieri facias in case of George Ellwanger and William C. Barry, Copartners, trading as Ellwanger & Barry, v. A. H. Moore, Defendant, and the Fidelity Trust Company, Joseph F. Sinnott and Walton Pennewill, Executors and Trustees of Andrew M. Moore, Deceased, Garnishees. Before MITCHELL, FELL, BROWN, MESTREZAT and POTTER, JJ. Reversed.

Rule to strike off fieri facias.

The facts appear by the opinion of the Supreme Court.

Error assigned amongst others was in discharging the rule.

Richard C. Dale, with him *O. Percy Bright* and *Simpson & Brown*, for the trustees, appellants.—The remedy of the attaching creditor is in the orphans' court: United States v. Kelley, 28 Fed. Repr. 845; Maurer v. Kerper, 102 Pa. 444; Sinnickson v. Painter, 32 Pa. 384; Lorenz v. King, 38 Pa. 93; Longwell v. Hartwell, 164 Pa. 533; Adams v. Harland, 7 W. N. C. 129; Merchants', etc., Nat. Bank v. Kern, 193 Pa. 67; Chester Valley Nat. Bank v. Speakman, 1 Chester Co. Rep. 124; Pancoast v. Gowen, 93 Pa. 66; Harrington v. Cambridge, 14 W. N. C. 456; Building Assn. v. Maher, 9 Pa. Superior Ct. 340; Hanley v. Heidelberg Compound Oxygen Co., 24 Pa. C. C. Rep. 502.

The view of the court below fails to recognize the limited character of a writ of fieri facias as distinguished from the statutory process of execution through an attachment. That choses in action cannot be levied upon and sold under a fieri facias is well settled: Dundas v. Dutens, 1 Vesey, Jr., 196; Rickert v. Madeira, 1 Rawle, 325; Rhoads v. Megonigal, 2 Pa. 39; Flagg v. Farnsworth, 16 Phila. 57.

The attaching plaintiffs are not entitled to their writs of execution. They can recover on their judgment only in the orphans' court, upon a final settlement of the trustees' account: Dundas's App., 73 Pa. 474; Lex's App., 97 Pa. 289; Watson's Est., 47 Pitts. L. J. 206; Middleton v. Norcross, 39 Legal Int. 90; Moser v. Mayberry, 7 Watts, 12; Walker v. Gibbs, 1 Yeates, 255; 1 Tr. & H. Prac. section 1183; Secor v. Witter, 39 Ohio, 218; Nat. Bank of Chester Valley v. Speakman, 1 Chest. Co. Rep. 124; Mengal v. Ins. Co., 5 Pa. Superior Ct. 491.

By no process of execution can the plaintiffs levy upon and sell the defendant's interest in the estate: Webb's Case, 24 How. Prac. 247.

John M. Gardner and *V. Gilpin Robinson*, for Albert H. Moore, appellant.

C. E. Morgan, 3d, and *Charles E. Morgan, Jr.*, for appellees.—The court below by its judgment has simply placed the ap-

pellees in the defendant's shoes, and given to them substantially the same right of disposition of the defendant's estate in remainder which he would have had if the attachment execution had not issued: Maurer v. Kerper, 102 Pa. 444.

Even if the statutes providing for attachment execution do not expressly provide as contended, for the levy and sale of interests of the character of that levied upon in this case by a fieri facias nevertheless under the rule established in numerous cases where there is no special statutory method of levy and sale, the attaching creditor would have the right to a fi. fa. so framed as to enable him to reach and sell the interest clearly covered by the act authorizing the attachment: Tidd's Practice, 1042; Srodes v. Caven, 3 Watts, 258; Welsh v. Bell, 32 Pa. 12; Freeman v. Simons, 7 Phila. 307; King, Brown & Co. v. Hyatt, 41 Pa. 229; Dengler's App., 125 Pa. 12; Smith v. Emerson, 43 Pa. 456; Kelly's App., 16 Pa. 59; Doner v. Stauffer, 1 P. & W. 198; Sinnickson v. Painter, 32 Pa. 384.

Opinion by Mr. Justice Mestrezat, May 18, 1903:

Andrew M. Moore died January 26, 1898. By his last will and testament, dated January 21, 1898, and probated February 10, 1898, he appointed the Fidelity Trust Company, Joseph F. Sinnott and Walton Pennewill his executors and trustees, to whom letters testamentary were granted by the register of wills of Philadelphia county. After making certain specific bequests, the testator directed that all the residue of his estate, real and personal, should be divided into three equal parts or shares and the one third part thereof he bequeathed to his executors and trustees to pay the net income and interest thereon to his son, Albert H. Moore, for life, with clauses creating a spendthrift trust, and after the death of his son Albert, the net income of said one third of his estate was to be paid to his sons, Henry G. Moore and George M. Moore, or the survivor of them, for life in the same manner as the testator had directed said income to be paid to his son, Albert, during his life. At the death of the survivor of his three sons the said one third of his residuary estate was bequeathed to his executors and trustees "with full power and authority to found and maintain such charitable or educational institution or institutions, in my name, as they in their discretion, may deem wise,

proper and expedient." The remaining two thirds of his residuary estate he disposed of in a similar manner, each of his other two sons being the primary beneficiary of one third thereof. The testator having died within one calendar month of the execution of the will, the bequest over to charity failed, and as to it there was an intestacy. The twelfth paragraph of the will contained the following provision: "I hereby authorize, empower and direct my said executors and trustees herein named, and the survivors or survivor of them, as soon as and whenever after my decease they may deem it convenient and proper to do so, to sell and dispose of any or all of the real and personal property of which I may die seized and possessed, either by public or private sale or sales, for the best price or prices that can be gotten for the same."

Ellwanger & Barry, the plaintiffs in this action, obtained a judgment against Albert H. Moore in the court of common pleas No. 2 of Philadelphia county, on which, January 27, 1902, they issued an attachment execution, and served the executors and trustees under the will of Andrew M. Moore, deceased, as garnishees. Interrogatories were filed and in answers thereto, filed June 12, 1902, the garnishees give the dates of the will, of its probate and of the death of the testator; refer to the eleventh clause of the will as defining the interest which the testator's sons take thereunder; admit that the garnishees are the trustees under the will of the deceased, that Albert H. Moore is named therein, and that the three sons are the heirs at law of the deceased and are all living; and set forth that the amount of the principal of the estate of Andrew M. Moore now held by the garnishees as trustees under the terms of the will exceeds $1,000,000. The plaintiffs entered a rule "to show cause why judgment should not be entered in favor of the plaintiffs and against the . . . . trustees under the will of Andrew M. Moore, deceased, garnishees, on their answers to interrogatories for the sum of $1,757.64, with interest from November 14, 1899, to be levied of the interest of the defendant in the estate of said decedent." This rule was marked absolute and a fieri facias was issued commanding the sheriff "that of the defendant's undivided vested interest in remainder in the estate of Andrew M. Moore, deceased, in the hands, possession or control of the Fidelity Trust Company, Joseph F. Sinnott and

Walton Pennewill, trustees under the will of the said Andrew M. Moore, deceased, garnishees, in your bailiwick, you cause to be levied as well the sum of $2,074.37," etc. The garnishees then entered a rule on the plaintiffs to show cause why the fieri facias should not be stricken off. This rule was discharged. The garnishees have, therefore, taken this appeal and assigned for error the action of the court below in making absolute the rule against them for judgment and in discharging the rule of the plaintiffs to show cause why the fieri facias should not be stricken off.

This attachment was issued pursuant to the provisions of the Act of April 13, 1843, Purd. Dig. 836, pl. 51, supplemented by the Act of April 10, 1849, Purd. Dig. 837, pl. 52. The former act provides that any interest which any person may have in the real or personal estate of any decedent, by will or otherwise, which is subject to foreign attachment by the act of July 27, 1842, shall be subject to be attached and levied upon in satisfaction of any judgment in the same manner as debts due are made subject to execution by the act of June 16, 1836; "and the same rights in all respects which the debtor may have, and no greater in any respect whatever, are hereby placed within the power of the attaching creditor." The act of 1849 authorizes the issuing of the attachment "at any time after the interest which any person or persons may have in the real or personal estate of any decedent, shall have accrued by reason of the death of such decedent."

It is conceded that the spendthrift trust in favor of Albert H. Moore, created by his father's will, is not subject to this attachment. And we need not concern ourselves in this controversy with the question what, if any, interest in the residuary estate vested in Albert H. Moore at his father's death and was subject to the attachment. The judgment of the court below against the garnishees did not define the interest or determine that Albert H. Moore had any interest in the residuary estate. Whatever it was, the enjoyment and possession of it were postponed until after the death of the last survivor of the testator's three sons. The right acquired to his interest, therefore, by purchase, attachment or otherwise, would be merely the right to demand and receive of his father's executors his distributive share of the estate on final settlement.

The only question we need determine here is the right of the attaching creditor to issue a fieri facias on his judgment and sell the undetermined and unascertained interest of Albert H. Moore in the estate of his father which accrued to him by reason of the failure to take effect of the charitable bequests in the will. It is earnestly contended by the learned counsel of the appellees that the legislation regulating the proceedings by attachment execution authorizes the issuing of a fieri facias and a sale thereon of the interest of Albert H. Moore in his father's residuary estate. But we think this position is untenable. As we have seen, the testator directed his executors and trustees to sell and dispose of his real and personal property, and hence there can be no doubt that the will effected a complete conversion of the estate. The interest, therefore, of Albert H. Moore in the residuary estate was not an interest in any personal property or real estate, but an interest in the money into which the testator had directed his property to be converted. The judgment creditor could not reach this interest by a common-law fieri facias, and hence he was compelled to resort to the statutory proceeding of an attachment execution. The effect of an attachment is to transfer to the attaching creditor the rights of the defendant in the decedent's estate: Lorenz v. King, 38 Pa. 93. "The attachment of this legacy," says LOWRIE, C. J., in Strong's Executors v. Bass, 35 Pa. 333, "does not alter the quantity of the rights and duties of the parties in relation to it; but only transfers to the plaintiffs the responsibility which before was due to the legatee. No essential element of the relation between the executor and the legatee is affected by the proceeding; it merely substitutes the legatee's creditor instead of the legatee himself." Not only has judicial construction defined the rights of a creditor attaching a legacy or an interest in a decedent's estate, but the statute of 1843 under which this attachment was laid expressly declares that "the same rights in all respects which the debtor may have, and no greater in any respect whatever, are hereby placed within the power of the attaching creditor." The attachment execution in this case had accomplished its purpose as declared by the statute when the judgment was entered against the garnishees. The attaching creditor then stood in the shoes of his debtor and was armed with the neces-

sary authority to demand and receive of the executors and trustees whatever interest the debtor might have as a distributee of his father's estate. No fieri facias or other writ of execution was required to invest the plaintiffs with the rights of the debtor in the decedent's estate. Such a writ, therefore, was not necessary to carry into effect the purpose of the attachment and to make it available to the creditor. The position of the appellees would have force and would be correct if the attachment had been laid against personal property or real estate. Then the fieri facias would be necessary to reach and realize on the debtor's interest in the property. An attachment execution is in substance, if not in form, an execution, Wray v. Tammany, 13 Pa. 394, and when it has at any stage of the proceedings transferred the property of the debtor, or his right or interest therein, to his creditor to the extent of satisfying the debt, it has accomplished its purpose.

The judgment as entered by the plaintiffs against the garnishees was not moulded so as to show the money or effects of the defendant in the hands of the trustees nor the quantity of his interest in the residuary estate of the testator. Neither did the answers to the interrogatories disclose this information. They simply gave the amount of the principal of the estate that was held by the trustees under the will. In this condition of the record the plaintiffs having by their attachment succeeded to the rights of the defendant against his interest in decedent's estate to the extent of their claim must enforce their judgment against that interest, the amount of which can only be determined by the orphans' court: Maurer v. Kerper, 102 Pa. 444. That court has the exclusive jurisdiction to ascertain the amount of the estates of decedents, and to order their distribution among those entitled, creditors as well as legatees and distributees: Hammett's Appeal, 83 Pa. 392; Maurer v. Kerper, supra; Yocum v. Commercial Nat. Bank, 195 Pa. 411. Hence on the final settlement and distribution of the estate of Andrew M. Moore by the orphans' court, the plaintiffs may have determined the interest of Albert H. Moore, the defendant, therein, and enforce their rights to said interest acquired by this attachment proceeding.

The order discharging the rule to strike off the writ of fieri facias is reversed and the rule is now made absolute and the

writ is set aside. The judgment of the court below against the garnishees is so far modified as to restrain its collection until the interest, if any, of the defendant in the estate of Andrew M. Moore is due and payable; and as thus modified, the judgment is affirmed. The costs of this appeal to be paid by the appellees.

Ellwanger *v.* Moore, Appellant.

Argued March 30, 1903. Appeal, No. 76, Jan. T., 1903, by Albert H. Moore, from order of C. P. No. 2, Phila. Co., Sept. T., 1899, No. 3259, discharging rule to strike off writ of fieri facias in case of George Ellwanger and William C. Barry, Copartners, trading as Ellwanger & Barry, v. A. H. Moore, Defendant, and the Fidelity Trust Company, Joseph F. Sinnott and Walton Pennewill, Executors and Trustees of Andrew M. Moore, Deceased, Garnishees. Before Mitchell, Fell, Brown, Mestrezat and Potter, JJ. Reversed.

Opinion by Mr. Justice Mestrezat, May 18, 1903:

For the reasons stated in the opinion this day filed in Ellwanger v. Moore, ante, p. 234, the order discharging the rule to strike off the writ of fieri facias is reversed and the rule is now made absolute and the writ is set aside. The judgment of the court below against the garnishees is so far modified as to restrain its collection until the interest, if any, of the defendant in the estate of Andrew M. Moore, deceased, is due and payable; and as thus modified, the judgment is affirmed. The costs of this appeal to be paid by the appellee.

Germantown Real Estate Deposit and Trust Company *v.* Moore, Appellant.

Argued March 30, 1903. Appeal, No. 64, Jan. T., 1903, by trustees, from order of C. P. No. 2, Phila. Co., June T., 1897, No. 926, discharging rule to strike off writ of fieri facias in case of Germantown Real Estate Deposit and Trust Company,

Ancillary Administrator of the Estate of Robert P. Pepper, Deceased, v. Albert H. Moore, and the Fidelity Trust Company, Joseph F. Sinnott and Walton Pennewill, Executors and Trustees of Andrew M. Moore, Deceased, Garnishees. Before MITCHELL, FELL, BROWN, MESTREZAT and POTTER, JJ. Affirmed.

OPINION BY MR. JUSTICE MESTREZAT, May 18, 1903 :

For the reasons stated in the opinion this day filed in Ellwanger v. Moore, ante, p. 234, the order discharging the rule to strike off the writ of fieri facias is reversed and the rule is now made absolute and the writ is set aside. The judgment of the court below against the garnishees is so far modified as to restrain its collection until the interest, if any, of the defendant in the estate of Andrew M. Moore, deceased, is due and payable; and as thus modified, the judgment is affirmed. The costs of this appeal to be paid by the appellee.

Germantown Real Estate Deposit and Trust Company *v.* Moore, Appellant.

Argued March 30, 1903. Appeal, No. 75, Jan. T., 1903, by Albert H. Moore, defendant, from order of C. P. No. 2, Phila. Co., June T., 1897, No. 926, discharging rule to strike off writ of fieri facias in case of Germantown Real Estate Deposit and Trust Company, Ancillary Administrator of the Estate of Robert P. Pepper, Deceased, v. Albert H. Moore, and the Fidelity Trust Company, Joseph F. Sinnott and Walton Pennewill, Executors and Trustees of Andrew M. Moore, Deceased, Garnishees. Before MITCHELL, FELL, BROWN, MESTREZAT and POTTER, JJ. Affirmed.

OPINION BY MR. JUSTICE MESTREZAT, May 18, 1903:

For the reasons stated in the opinion this day filed in Ellwanger v. Moore, ante, p. 234, the order discharging the rule to strike off the writ of fieri facias is reversed and the rule is now made absolute and the writ is set aside. The judgment

of the court below against the garnishees is so far modified as to restrain its collection until the interest, if any, of the defendant in the estate of Andrew M. Moore, deceased, is due and payable; and as thus modified, the judgment is affirmed. The costs of this appeal to be paid by the appellee.

National Bank of Boyertown, Appellant, *v.* Fridenberg.

Principal and agent—National bank—Banks and banking—Dealing in stocks—Notice.

Where a bank authorizes its cashier to buy and sell stocks, and the authority of the cashier is apparently general and without limitation as to the character and amount of the securities he is to purchase, and as to whether the transactions should be on margin or for cash, and it appears that the cashier opens an account in the name of the bank with a firm of brokers and buys and sells stocks on the bank's account, both for cash and on margin, and it also appears that large profits were made for the bank on the cash transactions, the bank cannot, after the cashier has absconded, claim that it was not liable for losses on some of the margin transactions.

Argued March 31, 1903. Appeal, No. 5, Jan. T., 1903, by plaintiff, from decree of C. P. No. 1, Phila. Co., Dec. T., 1901, No. 1814, dismissing bill in equity in case of National Bank of Boyertown v. Samuel M. Fridenberg and M. Samuel Fridenberg, trading as S. M. & M. S. Fridenberg. Before MITCHELL, FELL, BROWN, MESTREZAT and POTTER, JJ. Affirmed.

Bill in equity for an account.

BRÉGY, J., found the facts to be as follows:

On July 19, 1900, the cashier of the plaintiff bank opened an account with the defendant brokers in the name of "The National Bank of Boyertown." The first transaction was the purchase of one hundred shares of Union Pacific at fifty-seven and five-eighths, which was paid for in full in a few days; the second was a purchase of two hundred shares of American Tobacco at ninety-three and three quarters, also paid for in full in a few days. (This transaction was on July 31, 1900.) These stocks were sold in a few weeks at a profit, and

from that time on stocks and bonds were bought and sold when it was thought wise to do so. For quite awhile these speculations were made with the express authority of the president and directors of the bank; in fact, it is admitted that all the purchases of stocks and bonds that were paid for in full a few days after they were bought are properly chargeable to the bank. In many cases the securities bought would not be taken away from the brokers' possession by the bank, but would be held by the defendants till the bank wanted them or ordered them sold.

In October, 1901, the cashier absconded, and it was then discovered that he had not only speculated as he was specially authorized to do, namely, by paying in full for his purchases, but that he had bought stocks and bonds without paying for them, upon the strength of the securities in the hands of the brokers defendant. This sort of speculation was without the knowledge of the president of the bank or the directors.

The president of the bank received some $165,000 worth of securities from the defendants after the cashier's flight; ordered the remaining stocks, etc., bought by the cashier's order to be sold.

The balance resulting from this sale, less the amount due upon the various transactions, the bank declines to receive, claiming more. The question turns upon whether the bank is bound by the acts of the cashier. The bank claims that it is only bound by the purchases that the cashier made, when he paid for them in full (what is known as an outright purchase) and that the purchases otherwise made do not bind it.

I cannot agree to that contention.

The bank authorized its cashier to speculate; it sent no notice to the defendants of any limitation of the manner of it.

The bank received large sums as the result of many fortunate ventures, and finally ordered the balance of stocks, etc., on hand sold out and the account closed.

I think this course of conduct bound the bank for all the transactions of its cashier; it being remembered that every purchase and sale was made for the account of the National Bank of Boyertown on the books of the defendants.

I also think the cashier has power to bind the bank for purchases and sales of its securities, and that the order to sell out

the remaining stocks and bonds was an express affirmation of all that he had done.

For these reasons I grant the motion to dismiss the bill.

Error assigned was decree dismissing the bill.

R. C. Dale, with him *C. H. Ruhl*, for appellant.—Under no circumstances have parties the right to assume that a bank cashier has authority to make on the credit of the bank such speculative transactions as this record discloses: Western Nat. Bank v. Armstrong, 152 U. S. 346 (14 Sup. Ct. Repr. 572); West St. Louis Savings Bank v. Shawnee County Bank, 95 U. S. 557; Nat. Bank v. Newton Nat. Bank, 66 Fed. Repr. 691; Farmers' & Mechanics' Nat. Bank v. Smith, 77 Fed. Repr. 129; Jemison v. Bank, 122 N. Y. 135 (25 N. E. Repr. 264); Beard v. Milmine, 88 Fed. Repr. 868; Burkholder v. Beetem, 65 Pa. 496.

The lack of implied authority in a bank cashier to purchase corporate shares on the credit of the bank is further emphasized when the attention of the court is called to the decisions in which it is held that a national bank has no power to deal in stocks. The only way in which it can lawfully become the owner of shares in any corporation is when such acquisition is for the protection of a loan of money previously made upon the security of such shares: Concord Nat. Bank v. Hawkins, 174 U. S. 364 (19 Sup. Ct. Repr. 739); California Bank v. Kennedy, 167 U. S. 362 (17 Sup. Ct. Repr. 831); McCormick v. Market Nat. Bank, 165 U. S. 538 (17 Sup. Ct. Repr. 433); Zoebisch v. Rauch, 133 Pa. 532.

R. O. Moon and *E. Cooper Shapley*, for appellees.—When one party has completely performed and carried out its part of the contract, the other party cannot retain the benefits of such performances and refuse to perform also: 2 Cook on Corp., sec. 681, page 1373.

The rule is well settled that the plea of ultra vires should not prevail when it would not advance justice; but, on the contrary, would accomplish legal wrong: Leslie v. Lorillard, 110 N. Y. 519 (18 N. E. Repr. 363); Whitney Arms Co. v. Barlow, 63 N. Y. 62; Seymour v. Spring Forest Cemetery

Assn., 144 N. Y. 333 (39 N. E. Repr. 365); Parish v. Wheeler, 22 N. Y. 494; Thomas v. West Jersey R. R. Co., 101 U. S. 71; Wright v. Pipe Line Co., 101 Pa. 204; Boyd v. American Carbon Black Co., 182 Pa. 206; Union Trust Co. v. Mercantile Library Hall Co., 189 Pa. 263; Oil Creek, etc., R. R. Co. v. Penn. Trans. Co., 83 Pa. 160; Pittsburg, etc., R. R. Co. v. Altoona, etc., R. R. Co., 196 Pa. 452.

Opinion by Mr. Justice Mestrezat, May 18, 1903:

The plaintiff's bill was properly dismissed on the facts found and stated in the two opinions filed by the learned trial judge. The bill avers and it is conceded that the defendants, who were brokers, doing business in the city of Philadelphia, were employed by Mory to buy and sell securities for the plaintiff bank. The account was opened in July, 1900, in the name of "The National Bank of Boyertown" and ran till October, 1901. The defendants had a previous individual account with Mory, but it was closed more than a year prior to the opening of the account with the bank. It is not denied that Mory had authority to purchase and sell stocks and bonds for the bank. It is found as a fact that the bank authorized the cashier to speculate in stocks without any limitation as to the manner of doing so and that it received large sums as the result of fortunate speculations during the running of this account. After Mory, the cashier, had absconded in October, 1901, the president of the bank received from the defendants securities aggregating $165,000 and ordered the brokers to sell all the remaining stocks and bonds held by them for the plaintiff, which was done, and the balance due the bank on the account was remitted to it. An itemized account of all the stock transactions between the plaintiff and the defendants was furnished by the latter to the bank prior to the filing of this bill. The defendants had no private account with Mory, but all their dealings with him subsequent to July 19, 1900, were for and in the name of the bank. There was but one account of these transactions kept by the defendants and it contained all the securities purchased and sold through Mory from July 19, 1900, when the account was opened, until it was closed in October, 1901.

This bill was filed for an accounting and to compel the de-

fendants to deliver to the plaintiff bank any securities that might be found owing it. It is claimed by the plaintiff that the account should include only such securities as were purchased and sold for cash and should exclude all stocks and bonds not paid for in full at the time of the purchase. The former transactions are alleged to be legitimate and the latter, speculative and on Mory's individual account. The plaintiff has accordingly made two accounts from the account furnished it by defendants, the only account kept by them, and annexed the two accounts to its bill: one containing the transactions admitted to be legitimate and carried on by Mory for the bank, and the other alleged to be speculative and containing transactions carried on for the private account of Mory. It is averred that these accounts were "wrongfully merged into one account" by the defendants. But there is no sufficient evidence to sustain this averment or to warrant the conclusion that the defendants knew the purchase and sales of any of the securities were on Mory's individual account. The defendants had no reason to believe that the bank had confined Mory to cash transactions in his stock dealings on its account. The authority of the cashier in the matter was apparently general and without limitation as to the character and amount of the securities he was empowered to purchase, and as to whether the transactions should be on margin or for cash. Even if the financial standing of Mory had been discredited in the conversation between Wallick and the defendants, proof of which was rejected, it afforded no reason for the latter believing Mory was not authorized to act for the bank in all of the stock transactions subsequent to the date the account had been opened when it is conceded he had the authority to purchase and sell stocks for cash through the defendants as brokers. His standing for honesty and integrity was vouched for by the bank by its employing him as its cashier. His financial condition might be a reason for the defendants refusing to deal with him on his individual account, but it was no evidence of a limitation of his authority to act for a bank of which he was cashier and which admitted his authority to deal for it in securities.

We think the plaintiff must accept the account as a whole and that there is no reason shown by the evidence for excluding the transactions involving the losses. As said by the learned

judge: "There is no equity in the division of what was one account, as far as the defendants were concerned, into two, and thus pocket the profits of one kind of transactions and cast upon the defendants, not the loss of others, but the failure to make more profits than it would have made if certain other transactions had not taken place."

The decree is affirmed.

Baldwin, Appellant, *v.* Pennsylvania Fire Insurance Company.

Insurance — Fire insurance — Cancellation — Contract — Action — Parties.

A partnership consisting of two persons owned a policy of fire insurance which covered a building insured for an amount stated and the merchandise therein also for an amount stated. While the policy was in existence the partnership was dissolved, one of the partners transferring his interest in the merchandise to the other, and the latter his interest in the real estate to his copartner. At the same time they agreed that the policy should be changed to accord with their several interests. Four days after the dissolution the partner to whom the real estate had been conveyed died, and immediately thereafter the surviving partner informed the agents of the insurance company of the fact, and of what had been arranged. It was agreed between the surviving partner and the insurance company's agent that the company should issue two new policies, one to the surviving partner on the merchandise, and one to the deceased partner on the building, and that the two should be dated as of the day of the dissolution of the partnership. The company agreed to send the policy for the real estate to the attorney of the deceased partner. When the attorney received it he noticed that it was made out in the name of the deceased as the insured. Thinking that it was a mistake to have the policy issued in the name of the dead man, he sent it back to the agents with a request that it should be made out to the estate of the deceased. The agents persisted in their opinion that it was correctly made out and returned it. The attorney sent it back by a messenger, with instructions to explain the circumstances fully to the agents. The agents, however, adhered to their first opinion and asked the messenger whether the attorney wanted the policy canceled. He answered that the attorney did not want it canceled, and that the attorney would call and see them about it in a few days. He did call but failed to see the agents. Within a year afterwards a fire occurred which destroyed both building and merchandise. The company denied liability for loss on the building alleging that the policy had been canceled before the fire. In a suit upon the policy it

appeared that the company had not canceled the insurance in the manner prescribed by the policy by five days' notice, and the return of the unearned premium. *Held*, that the contract as to the new policy on the building was complete when the surviving partner acting as agent for his copartner and the insurance agent both agreed to it, and that the insurance company was liable for the loss of the building.

In such a case, it appearing that the insurance was for the insured or his legal representative, the suit can be sustained in the name of the administrator of the deceased partner, subject to the jurisdiction of the orphans' court to distribute the fund raised by it.

Argued April 13, 1903. Appeal, No. 240, Jan. T., 1902, by plaintiff, from judgment of Superior Ct., Jan. T., 1902, No. 51, affirming judgment of C. P. Luzerne Co., June T., 1898, No. 211, refusing to take off nonsuit in case of C. L. Baldwin, Administrator, v. Pennsylvania Fire Insurance Company. Before MITCHELL, DEAN, FELL, BROWN and MESTREZAT, JJ. Reversed.

Appeal from Superior Court.

The facts appear by the opinion of the Supreme Court and by the report in 20 Pa. Superior Ct. 238.

Error assigned was the judgment of the Superior Court.

John McGahren, for appellant.

Henry A. Fuller, for appellee.

OPINION BY MR. JUSTICE DEAN, May 18, 1903:

In 1897 John L. Bulford and H. M. Hatfield conducted a mercantile business in Dallas, Luzerne county in name of H. M. Hatfield & Company. They were joint owners of the building in which the business was conducted. On May 5, 1897, the defendant issued to them a policy of insurance against loss by fire for the term of three years, in which the building was insured for $1,000 and the merchandise therein for $2,000. On November 1, 1897, the partnership was dissolved on account of the failing health of Bulford who sold and transferred his interest in the merchandise to Hatfield and Hatfield sold and conveyed all his interest in the building to Bulford; at the same time they agreed that the insurance policy should be changed to accord with their several interests, the insurance on the

building to be assigned to Bulford and on the merchandise to Hatfield, the latter to arrange the formalities with the insurance company and have it consent to and ratify the transfer. Four days after the dissolution of the partnership Bulford died and four days after his death Hatfield called upon the agents of the insurance company and informed them fully of all that had occurred; he did not have the policy because thieves had entered the store soon after the dissolution of the partnership and had taken it; but the agents had an abstract or duplicate of it. The agents were willing to carry out the arrangement between Bulford and Hatfield as to the transfer and suggested that the policy should be treated as surrendered, and that the company issue two new policies, one to Hatfield on the merchandise and one to Bulford on the building and that the two should be dated as of the day of dissolution of the partnership and the day on which it was agreed their interests should be severed; Hatfield concurred in this suggestion and it was at the same time agreed that the policy for the Bulford interest should be mailed to Mr. Foster, Bulford's attorney. When Foster received it he noticed that it was made out to Bulford as the insured; he thought this was a mistake, for although Bulford was living at the date of it, he had died before it was delivered; he therefore sent it back to the agents to have it made out to the estate of Bulford; the insurance agents persisted in their opinion, that the policy being dated in the lifetime of Bulford, it was properly made out, and remailed it to Foster who on receiving it persisted in his opinion that it should be made out to the estate of Bulford and again sent it by messenger to the agents, with instructions to explain fully to them, that when the policy was written Bulford was dead, although alive when dated. The agents adhered to their first opinion and asked the messenger whether Foster wanted the policy canceled. He answered that Foster did not want it canceled and that Foster would call and see them about it in a few days; he did call but failed to see the agents.

Matters remained in this condition, when less than a year afterwards a fire occurred which destroyed both building and merchandise. Foster as attorney for the Bulford estate notified the company of the loss and made claim for indemnity on the building; the company denied liability on the ground, that

the policy had been canceled before the fire; thereupon the administrator of Bulford brought this suit. At the trial the facts were developed as we have stated them; the court of common pleas, being of opinion that there was no contract between the parties, because their minds had never assented to the same thing, nonsuited the plaintiff who appealed to the Superior Court. That court affirmed the judgment holding that: "A policy of insurance is a contract, and until the negotiations of the parties have brought them to such a stage, where it may fairly be said they have agreed upon something, no contract exists." And it held that under the evidence, both parties had not agreed and there was no contract of indemnity to Bulford on the building. On allowance of this court, an appeal from the judgment of the Superior Court comes before us. In substance the error assigned is the decision of the court that no contract existed.

We think the decisions of the common pleas and the Superior Court, as to what in this case on the evidence, constituted the contract, were wrong. The policy on the partnership property was issued to the partnership on May 5, 1897, for a three years' term, in sum of $3,000 and the full amount of the premium for the term paid; six months afterwards, on November 1, the partnership was dissolved; under the terms of the contract the partners could surrender the policy and claim the unearned premium, which, counting the whole term as thirty-six months, would be just five sixths of what they had paid; or they could with the company's consent accept individual policies for the remainder of the term for their respective interests and continue the insurance; or the company could return the unearned premium if it so chose and cancel the policy. This is the clause in the policy on the subject of cancelation:

"This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancelation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice it shall retain only the pro rata premium."

At the time of the dissolution it was agreed between the partners, that the policy should be continued in force, but that with consent of the company, their respective interests, Bulford's on the building and Hatfield's on the merchandise should be indorsed upon it; at the same time Bulford appointed Hatfield his agent to see the company's agent and attend to the matter. Four days afterwards, before Hatfield had time to attend to it Bulford died, but Hatfield two or three days afterwards called upon the agent and fully informed him of the agreement between him and Bulford and of Bulford's death; both insured and insurers desired a continuance of the indemnity for the remainder of the term; but the agent suggested that the best form to carry out the arrangement was to issue two policies, one to Hatfield for $2,000 on the merchandise and one to Bulford for $1,000 on the building, and date both the day of dissolution of the partnership; this was assented to by Hatfield and he left with the understanding that the policies were to be mailed; afterwards the agent mailed Bulford's policy made out in his name to his attorney Foster; he never delivered Hatfield's, but the company paid his loss just as if the policy had been delivered. Now this contract for the extension of the indemnity was complete when Hatfield left the agent's office. Hatfield, the agent of Bulford appointed by Bulford before his death to attend to this very matter, had performed fully his duty; the agent did not want the policy canceled or surrendered; he wanted to continue the risk; did not want to pay back five sixths of the premium already in the company's hands; he goes further, and in accordance with his own suggestion mails the policy for Bulford's interest in Bulford's name to his attorney Foster. But the policy mailed to Foster was not the contract; it was only the written evidence of the contract made between Hatfield and the agent of Bulford to extend the indemnity for the balance of the term. We suppose a fully authorized agent of the Bulford estate could afterwards have formally canceled the contract made by Hatfield, but nothing less than clear and positive evidence of an intention to do so would have had that effect. The company gave no notice of its intention to cancel as required by the contract nor did it return nor offer to return five sixths of the premium, a preliminary to cancelation as the contract required. We can take no

other view of the evidence, than that the contract of indemnity was complete when Hatfield and the agent both agreed to it and the agent by consent of Hatfield retained for the company the unearned premium.

Was the contract afterwards rescinded or canceled by the company or by consent of Foster, the attorney? The company could cancel it just one way at any time, that was, by five days' notice to the representative of the estate of its intention to do so and return of five sixths of the premium; it gave no notice and offered to return no premium. As to Foster, the attorney, we doubt whether his duties as attorney embraced that of canceling a policy of insurance upon a building of his deceased client; but even if he had such authority the evidence wholly failed to show an intention on his part to cancel. He wanted some change made in the name of the insured, but the messenger distinctly told the insurance agent that Mr. Foster did not want the policy canceled, but would call and see him about it and it so remained until after the fire. From the evidence, Foster wanted it his way and the insurance agent wanted it his, the way he and Hatfield had first agreed upon. It would be a travesty upon justice to permit the bickerings of these two agents about an immaterial matter to fritter away and destroy a part of a dead man's estate.

The suit can be sustained in the name of the administrator. It may be, on a distribution, the orphans' court will hold that the proceeds of the policy shall go to the heirs to the real estate, but the policy itself stipulates that wherever the word "insured" occurs it shall be held to include the legal representative of the insured. Although the money represents a loss on real estate, it is now turned into money and may be sued for by the administrator. When in his hands the orphans' court can properly make distribution.

The judgment of the Superior Court is reversed; the judgment of the common pleas is reversed and a procedendo is awarded. On a retrial it is directed that the law be announced as we have indicated and the evidence in so far as it appertains to the issue be submitted to a jury.

Miller *v.* Wilkes-Barre Gas Company, Appellant.

Gas companies — Liability of tenant for former tenant's gas bill — Notice.

A gas company chartered for the purpose of supplying with gas a municipality and such individuals residing therein as might desire gas, and having the right of eminent domain, is bound to supply gas to any resident of the municipality, and it cannot refuse such a supply to a tenant because of a refusal of the latter to pay a former tenant's gas bill, if it appears that the tenant before going into possession had no actual notice that he would be required to pay such bill, and was not affected with constructive notice by any resolution or by-law of the company to that effect.

Gas companies—Refusal to supply gas—Damages—Measure of damages.

In an action by a saloon keeper against a gas company to recover damages for the refusal of the defendant to furnish gas to plaintiff, it is error for the court to permit the jury to include in its verdict a recovery for loss of profits where the plaintiff has produced no books of account, bills, vouchers, or any written or parol evidence of his profits before he was deprived of gas, and of his profits thereafter, and nothing is produced to the jury upon which they could base any inference that there had been any loss of profits.

Argued April 14, 1903. Appeal, No. 83, Jan. T., 1903, by defendant, from judgment of C. P. Luzerne Co., Dec. T., 1897, No. 552, on verdict for plaintiff in case of Willian H. Miller v. Wilkes-Barre Gas Company. Before MITCHELL, DEAN, FELL, BROWN and MESTREZAT, JJ. Reversed.

Trespass to recover damages for refusing to supply plaintiff with gas. Before WHEATON, J.

The facts appear by the opinion of the Supreme Court.

Verdict and judgment for plaintiff for $2,500. Defendant appealed.

Errors assigned were (10) answer to defendant's tenth point quoted in the opinion of the Supreme Court; (11) refusal of binding instructions for defendant.

Henry A. Fuller, for appellant.—The gas company is under no compulsory obligation to supply gas except to such customers

as it may choose: McCune v. Norwich City Gas Co., 30 Conn. 521; Harvey v. Thomas, 10 Watts, 63; Pocopson Road, 16 Pa. 15.

Even if defendant had no such right, recovery should have been restricted to nominal damages at most.

The evidence relative to profits was not only inadequate but also incompetent: McKnight v. Ratcliff, 44 Pa. 156; Railway Co. v. Lauderbach, 4 Penny. 406; Goodhart v. Penna. Railroad Co., 177 Pa. 1.

James L. Lenahan, with him *William Goeckel*, for appellee.—It is the legal duty of the defendant, within the limits of its manufacture and production of gas, upon the line of its mains, and within the limits to which the same extend, to supply gas to a resident of the city for illuminating purposes, who desires the same, who is ready and willing to pay for it, and to comply with all reasonable rules of the company: Stern v. Gas Co., 2 Luzerne Leg. Reg. 449; Hoehle v. Allegheny Heating Co., 5 Pa. Superior Ct. 21.

The plaintiff, if entitled to a verdict, should have such damages as would compensate him for the pecuniary loss, and also for the inconvenience and annoyance experienced by him in his mercantile business, arising out of the defendant's refusal to furnish gas to the plaintiff: Shepard v. Milwaukee Gas Light Co., 15 Wis. 318; Coy v. Indianapolis Gas Co., 146 Ind. 655 (46 N. E. Repr. 17); Rogers v. Bemus, 69 Pa. 432; Crozer v. New Chester Water Co., 148 Pa. 130; Spigelmoyer v. Walter, 3 W. & S. 540; Penna. R. R. Co. v. Dale, 76 Pa. 47.

Opinion by Mr. Justice Dean, May 18, 1903:

In November, 1896, Miller, the plaintiff, became tenant of a house and lot in Wilkes-Barre, known as Farr's Hotel. When he took possession the former tenant, when he left the premises, was in arrears on his gas bills to the amount of $15.73, which had been furnished by this defendant company; plaintiff himself during his occupancy in the month of November had incurred an additional bill of $9.02. He was willing to pay and offered to pay his own bill, but refused to pay the arrears of the tenant who preceded him. The defendant refused the offer

and notified Miller unless he paid the whole bill his meter would be taken out. Soon after defendant's agent went to the hotel and again demanded payment of the whole bill; the plaintiff again offered to pay his own bill, $9.02, and tendered therefor a $10.00 gold coin, but refused to pay the bill of the former tenant. The tender was refused; defendant then took out the meter which was its property. For eleven months plaintiff was without gas and used for illuminating purposes oil lamps. He then brought this suit against defendant for damages. In his statement he averred that: 1. Defendant was a corporation, chartered under the general act of April 20, 1854, for the purpose of supplying the public of the borough of Wilkes-Barre and such individuals residing therein as might desire the same, with gas, and under its charter for many years supplied the hotel occupied by plaintiff with gas for lighting purposes. 2. That in the month of December, 1896, without any legal cause or justification, the defendant removed from the hotel the gas meter theretofore placed therein, thereby depriving plaintiff of the use of the gas light and damaging him in the amount of $3,000. The defendant pleaded the general issue and the case came on for trial.

The defense was: 1. Defendant had a right to remove the meter because its charter imposed no obligation upon it to furnish gas to any particular individual, to whom it did not choose to furnish it. 2. It had a right to remove the meter in default of payment by the prior tenant. 3. Plaintiff had adduced no sufficient proof of any loss sustained by removal of the meter. 4. Plaintiff, on the evidence, is not entitled to recover for loss of profits in his business as damages for the removal of the meter.

There were other assignments of error, altogether thirteen in number, but as concerns this appeal the discussion of them can be embraced under these four heads.

As to the charter obligations of defendant, its duty to the public and to members of that public is so fully discussed in opinion by Judge RICE, Stern v. Wilkes-Barre Gas Company, 2 Kulp, 449, that it would be a mere repetition of his views for us to again go over that ground. He discusses in his opinion the obligations of this very charter and demonstrates clearly the result of his conclusions thus:

"When, therefore, the respondent was incorporated for the express purpose of supplying gas to the city, and such individuals residing therein as might desire the same, and for this purpose was given the right of eminent domain, we conclude that the legislature had a public purpose in view beyond, but not inconsistent with the respondent's gain and profit; and that from the nature of the declared purpose for which it was created, taken together with, and explained by, the nature of the extraordinary privileges, which were granted to carry out that purpose, a legal duty is implied; and further that a resident of the city, coming within the conditions of the question stated at the outset, has a right such as can be enforced by mandamus."

Therefore, defendant not only had the power under its charter to supply gas to the public, it also took on itself the obligation to supply it to the general public, and also, in the words of its charter, to supply it "to such individuals residing therein (that is in the borough), and in the immediate vicinity as may desire a supply of the same." The defendant was bound to supply the plaintiff with gas if he desired the same. That he did desire it cannot be questioned; that defendant refused to supply it cannot be questioned.

Can the refusal be justified on the second ground of defense? The prior occupant of the same premises owed $15.75 and defendant demanded that this amount be also paid or the meter should be taken out; plaintiff absolutely refused to pay this amount. That a municipality or corporation furnishing water or gas may by ordinance or by-laws make reasonable rules and regulations to insure the payment of bills, among others, that of stopping the supply unless all arrearages are paid, whether owing by the tenant in possession or his predecessors, has been settled: Girard Life Insurance Co. v. Philadelphia, 88 Pa. 393; Brumms's Appeal, 22 W. N. C. 137. But there must be notice to, or knowledge of the incoming tenant of such rule. In case of a municipality the regulation must be by ordinance; of this all have actual or constructive notice. In case of a quasi public corporation such as this defendant, the regulation ought to be by resolution or by-law or at least by actual notice. The incoming tenant must somewhere be able to find out before he enters upon possession his liability. If by merely entering into possession

he assumes payment of another man's debts, he should have that knowledge or the means of it. In the case before us there was no evidence of such rule on part of this company; the first notice plaintiff had that he was held answerable for the former tenant's bill was the demand upon him for it when he offered to pay his own bill. This was not sufficient to charge him. Therefore, we hold, that on the undisputed facts in this case the demand for the back bills at that late date was illegal.

The next question raised by the assignments is as to the sufficiency of the proof of damages. The period that might be covered by the evidence is from December 26, 1896, when the meter was removed, to November 17, 1897, when this suit was brought, about eleven months. The verdict was for $2.500 or about $7.00 per day damages. There was nothing in the case calling for punitive damages; plaintiff could only claim to be made whole. What in money had he actually lost by the wrongful act of defendants, he was entitled to no purely speculative profits. Plaintiff's evidence on this question seems to us somewhat vague, nor is the charge of the court so clear as to guard the jury from guessing at what ought to have been made reasonably certain. Nor does the learned judge himself seem very sure of his ground, for in his opinion on the motion for a new trial he says: "I was not satisfied at the trial nor am I now satisfied that the plaintiff's proof of the amount of damage sustained by him was clear and satisfactory as from the nature of the case ought to have been adduced." In the charge he submitted the evidence to the jury, saying to them: "If you should decide that plaintiff is entitled to recover in this case, the thing which has bothered me most as you evidently have noticed, is the question whether plaintiff has shown such clear specification of damage sustained by him on account of the turning off of his gas as under the law would warrant me in submitting the question to you." The court, it seems, might well have been in doubt as to its duty in this particular. The plaintiff himself testified that the greater part of his profits accrued from sales of liquor at the bar; the substitution of lamps for gas burners would only change the kind of light; the customer would not necessarily be deterred from taking his drink because he must now swallow by the light of an oil lamp, whereas he formerly took it by the light of a gas jet.

We understand, that he might not be able to fix with exactness his loss, but if he could not adduce evidence, that would warrant a jury in fixing it to a reasonable certainty, that is his misfortune; it is no reason why a jury should be permitted to guess at the amount. He testifies, that while he burned gas his gross receipts except on Saturdays were $20.00 to $22.00 per day, and on Saturdays $65.00; that by lamp light they were about half this; that the profit was sixty per cent; from what he says, obviously, this was a guess on his part; for he says he kept no book whatever; that he never put down his receipts or expenses; that he kept no bank account; that he put in his pocket whatever money came in; did not keep a bank account; he could not tell the exact amount taken in any one day of the eleven months or in the month before the meter was taken out. Surely this was not the best evidence he might as a prudent man have had, for he knew immediately after the meter was taken out he would claim damages; he could, then with some reasonable certainty have proven the receipts for the first month and his daily accounts would have shown what they were afterwards. Although he knew he would claim that defendant should pay to him a large amount of money he took no means whatever to preserve evidence to show the justice of his claim. He practically guesses at his receipts, expenses and profits and this is all the testimony there was on the subject. Surely he bought his liquors from wholesalers and paid for them; their books would show what he bought the month before the meter was removed and what the succeeding eleven months; deducting what he had on hand at the end of that period would show his sales; no evidence of this kind was offered. Another significant fact is, that he agreed to pay rent for the premises at the rate of $360 per year when the meter was in; after it was taken out he rented the next year at the rate of $480. This does not indicate a loss of custom.

We think there was no sufficient evidence to warrant the jury in assessing plaintiff's supposed loss of profits as damages and that when the learned judge instructed the jury that they might find for plaintiff on the evidence all damages which he had proven "in a clear and satisfactory way" was error; for he had not proven in a satisfactory way any loss of profits;

his evidence on that point was wholly insufficient and for that reason the judgment is reversed.

We will not say that he is entitled to only nominal damages. If his expenses for lighting by lamps was greater, or his payment for services increased, his damages may be more than nominal, but they are not more by any sufficient evidence of loss of profits.

The tenth assignment of error is sustained; it is as follows: "10. The court is requested to instruct the jury: the plaintiff is not entitled to recover for loss of profits in his business. *Answer:* Refused." This should have been affirmed; the judgment is reversed and a venire facias de novo awarded.

Megary's Estate.

Will—Form of will—Testamentary paper—Probate.

No formal words are necessary in order to make a valid will; the form of the instrument is immaterial, if its substance is testamentary. A gift or bequest after death is of the very essence of a will, and determines a writing, whatever its form, to be testamentary. Whether a writing is a will or not, does not depend upon the maker's declaring it to be a will at the time he executes it, but upon its contents.

A paper duly executed in conformity with the Wills' Act was offered for probate as follows: "To whom it may concern: This is to certify that in consideration of the fact that my step-daughter has shared her home with me and attended to my business, correspondence &c., for me since the decease of my husband, and that she has made no charge for said courtesies during said period of time, Now, therefore, be it known that I desire and so affirm that my said step-daughter shall receive as compensation for said services out of my estate a sum of money or its equivalent that shall aggregate two thousand dollars—the aggregate amount of one hundred dollars per year for a period of twenty years to date. I also wish it to be understood that the above mentioned compensation shall not affect any right that she may have as devised to her in any will or testament of mine that may be in force at the time of my decease." It appeared that the amount mentioned in the paper was about half the estate which consisted of railroad and other stocks. The paper was delivered to the stepdaughter, and remained in her possession until the stepmother's death. *Held*, that the paper was testamentary in character, and should have been admitted to probate.

The delivery of a testamentary paper to the person beneficially inter-

ested, where no present interest passes, does not destroy the testator's power of revocation. It is still ambulatory; to take effect only after death in case it is not revoked.

Argued April 27, 1903. Appeal, No. 287, Jan. T., 1902, by Anna J. Megary Ege, from decree of O. C. Cumberland Co., dismissing appeal from register of wills in estate of Sarah Megary. Before MITCHELL, DEAN, FELL, MESTREZAT and POTTER, JJ. Reversed.

Appeal from register of wills refusing to admit paper to probate.

The facts are stated in the opinion of the Supreme Court.

Error assigned was in dismissing the appeal.

F. E. Beltzhoover and *E. M. Biddle, Jr.*, with them *H. M. Zug*, for appellant.—No formal words are necessary to make a will if the substance be testamentary. A gift or bequest after death is of the essence of a will and determines the writing to be testamentary. Whether a writing is a will does not depend upon the maker declaring it so when he executes it but upon its contents: Protestant v. English, 71 Pa. 454; Cover v. Stem, 67 Md. 449; Habergham v. Vincent, 2 Ves. Jr. 204; Turner v. Scott, 51 Pa. 126; Frew v. Clarke, 80 Pa. 170; Schads's App., 88 Pa. 111; Wilson v. Van Leer, 103 Pa. 600; Fosselman v. Elder, 98 Pa. 159; Rose v. Quick, 30 Pa. 225; Frederick's App., 52 Pa. 338; Tozer v. Jackson, 164 Pa. 373; Knox's Est., 131 Pa. 220; Ferris v. Neville, 54 L. R. A. 464; Clarke v. Ransom, 50 Cal. 595; Woods's Est., 36 Cal. 75; Byers v. Hoppe, 61 Md. 206.

Conrad Hambleton, of *Wetzel & Hambleton*, with him *J. G. Fletcher*, *F. H. Hoffer*, *W. J. Zacharias* and *Gillan & Gillan*, for appellees.—The paper was not testamentary in character: Rose v. Quick, 30 Pa. 225; Turner v. Scott, 51 Pa. 126; Frederick's App., 52 Pa. 338; Frew v. Clark, 80 Pa. 170; Schad's App., 88 Pa. 111; Fosselman v. Elder, 98 Pa. 159; Wilson v. Van Leer, 103 Pa. 600; Fouche's Est., 147 Pa. 395; Kisecker's Est., 190 Pa. 476; Harrison's Est., 196 Pa. 576; Knox's Est., 131 Pa. 220; Tozer v. Jackson, 164 Pa. 373.

The instrument is not testamentary because it is not ambulatory or revocable in its nature: Rudy v. Ulrich, 69 Pa. 177; Bradish v. McClellan, 100 Pa. 612.

Opinion by Mr. Justice Mestrezat, May 18, 1903:

This is an appeal from the decree of the court below dismissing an appeal from the decision of the register of wills, refusing to admit to probate the following written instrument:

"To whom it may concern:

"This is to certify that in consideration of the fact that my step-daughter Anna J. Megary Ege has shared her home with me and attended to my business, correspondence &c., for me since the decease of my husband, William C. Megary, and that she has made no charge for said courtesies during said period of time. Now, therefore, be it known that I, Sarah Megary, desire and so affirm that my said step-daughter shall receive as compensation for said services out of my estate a sum of money or its equivalent that shall aggregate two thousand dollars—the aggregate amount of one hundred dollars per year for a period of twenty years to date.

"I also wish it to be understood that the above mentioned compensation shall not affect any right that she may have as devised to her in any will or testament of mine that may be in force at the time of my decease.

"Witness my hand and seal this twenty-third day of November, A. D. 1899.

"Witnesses: Sarah Megary. [Seal]"

"L. A. Brownawell.

"Mrs. Mary Frymier.

It is shown by the testimony of the two subscribing witnesses that the paper was signed by Mrs. Megary in their presence when she was of sound mind. It is conceded that the instrument was executed in conformity with the Wills' Act of 1833, and it is not alleged that Mrs. Megary at the time lacked testamentary capacity or was influenced in any way in signing the paper. The register refused to admit the writing to probate on the ground that it was not a testamentary disposition of property. The correctness of this interpretation of the paper by the register, approved by the court below, is the single question for consideration here.

At the time she executed the instrument Mrs. Megary had passed her eighty-sixth year. She was a widow without children and for more than a quarter of a century, during her widowhood, had made her home with Mrs. Ege, the only child of her husband by a former marriage. From the testimony returned with the record, it is apparent that the amount named in the paper offered for probate was at least half of her estate, which consisted of railroad and other stocks. The writing was signed at the residence of Mrs. Ege on one occasion when Mrs. Megary was leaving home to make a visit to some of her friends.

We have no doubt that the paper in question is testamentary in character. Its language and the circumstances surrounding its execution and preservation lead to the conclusion that Mrs. Ege was not to receive the $2,000 until after Mrs. Megary's death. While it recognizes the kindness of Mrs. Ege in gratuitously sharing her home with Mrs. Megary since the death of the latter's husband and the desire to compensate Mrs. Ege for her services, yet there is no acknowledgment of an existing liability nor a promise to pay any sum for the courtesies extended to her by her stepdaughter. No present interest in or claim on the $2,000 passed to Mrs. Ege by any provision of the instrument, and hence, no action could have been maintained by her against Mrs. Megary in the latter's lifetime to recover the money. Omitting from the second paragraph, the operative and disposing part of the instrument, the words which may be treated as surplusage, that paragraph reads as follows: "I, Sarah Megary, desire and so affirm that my said step-daughter shall receive out of my estate a sum of money or its equivalent that shall aggregate two thousand dollars." Stripped of verbiage, such is the operative language of the paper under consideration. It expresses no intention to assume a personal liability. It is a command to the parties to whom it is addressed who are evidently the persons interested in the settlement and distribution of Mrs. Megary's estate after her death that the beneficiary named in the instrument shall at that time receive the money out of the estate. The words "shall receive" plainly denote a disposition of the subject-matter to take effect or become operative in the future. They bear no other reasonable interpretation. We think it is clear from the context that the term "estate"

refers to the property that the maker of the paper should possess at the time of her death. The entire language of the clause in question excludes the idea of an intention to create a present indebtedness or to assume any liability whatever.

Aside from the instrument itself, the circumstances surrounding its execution and preservation sustain the position that its operation was to be postponed until after the death of the maker. The principal of Mrs. Megary's estate was small and the income derived from it was scarcely sufficient to support her if she lived in the most economical manner. Without a clear intention expressed to the contrary, it cannot be presumed that she intended in the paper in question to dispose of her property without any consideration and thus deprive herself of the means of her own support. Such, however, is the effect of the appellee's interpretation of this paper, as it was either a legal obligation for the payment of $2,000, or a testamentary disposition of it.

It is urged by the learned counsel for appellee that the instrument was given as an obligation to secure payment for services rendered and was delivered to Mrs. Ege, who retained possession of it until Mrs. Megary's death, and that, therefore, it was irrevocable and hence not testamentary. As already observed, neither the instrument itself nor the circumstances surrounding its execution and preservation justifies the conclusion that it created an obligation on the part of Mrs. Megary to pay Mrs. Ege $2,000. And the fact of its delivery to Mrs. Ege and that she had the possession of it, does not destroy its revocability. "It has never been supposed," says PAXSON, J., in Wilson v. Van Leer, 103 Pa. 600, "that the delivery of a testamentary paper to the person beneficially interested, where no present interest passes, destroyed the testator's power of revocation. It is still ambulatory; to take effect only after death in case it is not revoked."

It is also contended that the last paragraph of the paper shows that the instrument was not testamentary but an obligation for the payment of the sum named in it. We do not think that clause of the instrument sustains the contention. It is merely precautionary and was intended to disclose the intention that Mrs. Ege should receive out of Mrs. Megary's estate after her death, not only the $2,000, but any additional sum that

might be given her by "any will of mine that may be in force at the time of my decease." Any bequest to Mrs. Ege in a subsequent will in force at the testatrix's death was to be regarded as cumulative to the one given her in this instrument.

As a will, this paper is irregular in form and was most inartificially drawn. These facts, however, will not deprive it of its testamentary character, if it is a disposition of property to take effect after death. As said by WILLIAMS, J., in Patterson v. English, 71 Pa. 454: "No formal words are necessary in order to make a valid will; the form of the instrument is immaterial, if its substance is testamentary. A gift or bequest after death is of the very essence of a will, and determines a writing, whatever its form, to be testamentary. Whether a writing is a will or not, does not depend upon the maker's declaring it to be a will at the time he executes it, but upon its contents." The instrument in question was clearly a disposition of property to take effect after death and was, therefore, of a testamentary character. Hence, the refusal to admit it to probate was error.

The decree of the court below and the decision of the register of wills are reversed, and it is now ordered, adjudged and decreed that the register admit to probate, when duly proven, the paper dated November 23, 1899, and signed by Sarah Megary, the costs of this appeal to be paid by the appellees.

Bobb, Appellant, *v.* Union Traction Company.

Negligence—Street railways—Crossings—"Stop, look and listen"—Motormen.

The rule that persons about to cross a street railway must not only look when first entering the street, but must continue to look until the track is reached, applies to motormen upon street cars; and if a motorman is injured by failure to observe this rule he cannot recover from the street railway company, and this is the case although the car which he is operating may have the right of way over the car with which he collides.

The motorman first reaching a street crossing with his car may not go on and by casting the whole burden of care on the other imperil the property of the company and the lives of the passengers in his car.

Argued March 30, 1903. Appeal, No. 66, Jan. T., 1903 by plaintiff, from judgment of C. P. No. 3, Phila. Co., Dec. T., 1900, No. 226, on verdict for defendant in case of James Bobb v. Union Traction Company. Before MITCHELL, FELL, BROWN, MESTREZAT and POTTER, JJ. Affirmed.

Trespass to recover damages for personal injuries.

The court gave binding instructions for defendant. Plaintiff appealed.

Error assigned was in giving binding instructions for defendant.

Thomas A. Fahy, for appellant, cited: Hamilton v. Consolidated Traction Co., 201 Pa. 351; Raulston v. Phila. Traction Co., 13 Pa. Superior Ct. 412; Callahan v. Phila. Traction Co., 184 Pa. 425; Tompkins v. Scranton Traction Co., 3 Pa. Superior Ct. 576; Lebbering v. Struthers et al., 157 Pa. 312; Huntsinger v. Trexler et al., 181 Pa. 497.

Thomas Leaming, with him *Russell Duane*, for appellee, cited: Ehrisman v. East Harrisburg City Pass. Ry. Co., 150 Pa. 180; Burke v. Union Traction Co., 198 Pa. 497; Tyson v. Union Traction Co., 199 Pa. 264; Pieper v. Union Traction Co., 202 Pa. 100; Keenan v. Union Traction Co., 202 Pa. 107.

OPINION BY MR. JUSTICE FELL, May 18, 1903:

The plaintiff was a motorman in charge of one of the defendant's cars which was running south on Twenty-second street. When it reached the north side of Market street, which is crossed by Twenty-second street at right angles, he stopped at the crossing to let passengers get off and on. When signaled to go on, he looked both ways and saw a car approaching from the east on Market street, on the north track, which is twenty feet from the curb. This car was 150 feet from the place where the tracks crossed. He then started his car and proceeded slowly at the rate of a mile and a half an hour across Market street without looking again. A collision occurred in which his car was struck about the middle by the Market street car. When he started from the crossing, the

Market street car was within sixty feet of the Twenty-second street tracks, running on a down grade at the rate of five miles an hour, and the motorman had lost control of it. If the plaintiff had looked again before attempting to cross the track, he would have seen the Market street car within twenty feet of him and would have observed the ineffectual attempts of its motorman to stop it.

It was his duty to look again, notwithstanding that the rules of the company gave him the right of way. We have repeatedly held that the duty of persons walking or driving at a street crossing to look for an approaching car is imperative, and that it is not performed by looking when first entering the street, but continues until the track is reached: Burk v. Union Traction Co., 198 Pa. 497, and cases there cited; Pieper v. Union Traction Co., 202 Pa. 100. This rule is equally imperative in the case of motormen, and the one first reaching a street crossing with his car may not go on and by casting the whole burden of care on the other imperil the property of the company, and the lives of the passengers in his car. The court was clearly right in entering a nonsuit on the ground stated, that the plaintiff was negligent in attempting to cross Market street without looking again for a car. There are other grounds on which a nonsuit would be sustained, but we rest the affirmance of the judgment on this one in order that there may be plain and distinct notice of the duty of motormen in this regard.

The judgment is affirmed.

Sutliff *v.* Pennsylvania Railroad Company, Appellant.

Negligence—Railroad—Bridge—Province of court and jury.

A railroad company owned a covered bridge 800 feet long. At the side of the track was a wagon road used by the public on the payment of tolls, but so close to the track that a train and a wagon could not safely pass at the same time. On the approach to the covered portion of the bridge the space between the side of the cars and the wheels of wagons was only three or four feet. A safety gate was placed at the land end of the approach. The gate was lowered when the bridge was in use for the passage of trains, and raised when the gate was opened to the public. The

driver of a wagon who knew the rules as to the gate, having paid toll and finding the gate raised drove on the approach. After a time he was stopped by a line of wagons which had been halted near the end of the bridge. This was caused by the derailment of some cars on a train that was being pushed across the bridge in the direction in which the driver was going. At the time the driver stopped, this train had been cut in two and a locomotive with tender in front was drawing a portion of the train back towards the driver at the rate of eight to nine miles an hour. The driver testified that when he stopped, he got off the wagon and stood on the tracks, and then for the first time saw the train. He was not able to extricate himself, and he was injured in the attempt to hold his horses. *Held* in an action against the railroad company to recover damages for the injuries, that the case was for the jury.

Argued April 13, 1903. Appeal, No. 163, Jan. T., 1903, by defendant, from judgment of C. P. Luzerne Co., March T., 1899, No. 266, on verdict for plaintiff in case of Wells Sutliff v. Pennsylvania Railroad Company. Before MITCHELL, DEAN, FELL, BROWN and MESTREZAT, JJ. Affirmed.

Trespass to recover damages for personal injuries. Before LYNCH, P. J.

The circumstances of the accident are stated in the opinion of the Supreme Court.

Verdict and judgment for plaintiff for $2,000. Defendant appealed.

Error assigned was in submitting the case to the jury.

Henry W. Palmer, for appellant.—Open gates do not relieve the traveler from the imperative duty which the law puts upon him, to stop, look and listen: P. & R. R. R. Co. v. Killips, 88 Pa. 405; Matthews v. Phila. & Read. R. R. Co., 161 Pa. 28; Lehigh Valley R. R. Co. v. Greiner, 113 Pa. 600; Trout v. Electric Ry. Co., 13 Pa. Superior Ct. 24; Meyers v. B. & O. R. R. Co., 150 Pa. 386; Lees v. P. & R. R. R. Co., 154 Pa. 46; Gangawer v. P. & R. R. R. Co., 168 Pa. 265; Connerton v. D. & H. Canal Co., 169 Pa. 339; Sellers v. Union Traction Co., 21 Pa. Superior Ct. 5; Kilpatrick v. Penna. R. R. Co., 140 Pa. 502; Penna. R. R. Co. v. McTighe, 46 Pa. 316.

John T. Lenahan, with him *E. F. Cooke*, for appellee.—A private corporation operating a toll bridge which invites trav-

eler, with a team, to a place of danger on the same in violation of its bridge regulations and without contributory negligence on his part, and injures him by fright of team in the running of its train, is responsible in damages for such neglect: Plymouth Twp. v. Graver, 125 Pa. 24; Cougle v. McKee, 151 Pa. 602.

Opinion by Mr. Justice Fell, May 18, 1903:

The only error assigned is the refusal of the court to direct a verdict for the defendant on the ground of contributory negligence. The defendant owns a covered wooden bridge 800 feet long which spans the Susquehanna river at Nanticoke and is used for the transportation of its cars and by the public on the payment of tolls. The eastern approach to the bridge is an elevated trestle 900 feet long, twenty-one feet wide, and twenty feet high, on one side of which are the railroad tracks and on the other a passageway for wagons. The bridge is not wide enough to allow its use by cars and wagons at the same time, and on the approach the space between the side of a car and the wheels of a wagon passing it is only three or four feet. Because of the impossibility of cars and wagons passing on the bridge, and the great danger in their passing on the approach, a safety gate is placed at the eastern end of the approach. This gate is lowered when the bridge is in use for the passage of trains, and raised when the bridge is open to the public. This use of the bridge was understood by the plaintiff, who, having paid toll and finding the gate raised, drove on the approach. After proceeding about 700 feet, he was stopped by a line of wagons which had been halted near the end of the bridge. It appeared that some of the cars of a coal train that was being pushed across the bridge in the direction the plaintiff was going had been derailed at the west end of the bridge. In order to clear the track the train had been cut, and at the time the plaintiff was stopped, a part of the train was being drawn out of the bridge by an engine running with its tender in front. The plaintiff testified that he got off the wagon and stood on the railroad tracks, and then for the first time saw this train as the engine was coming out of the bridge; that it approached and passed him at the rate of eight or ten miles an hour, and that he was injured in the attempt to hold his horses.

This is the testimony that the court had to consider in passing on the request for instructions. We see nothing in it that would warrant the withdrawal of the case from the jury. The plaintiff drove on the approach with notice because of the position of the gate that the bridge was open and safe for travel. The engine was then half way across the bridge, and if the plaintiff could have seen it, his natural assumption would have been that it was going in the same direction he was, and that he could proceed in safety. When he first saw that he was in danger, he had neither time to turn around nor space in which to do so, as the engine was within 200 feet of him and the approach to the bridge was too narrow to admit of his turning his wagon. Of course, the fact that the gate was up would not release him from the charge of contributory negligence if he went on notwithstanding an obvious danger which he saw or should have seen. But this view of the case was fully covered in the charge in which it was said: "Although the pole or gate was raised, still it was Mr. Sutliff's duty to exercise reasonable care to see that there was no danger or apparent danger on the bridge. . . . If you believe he saw the engine on the bridge, had reason to believe it would return, and found he was in a bad place and could with reasonable skill and effort extricate himself from the place, it was his duty to so do."

The judgment is affirmed.

Bowman *v.* Knorr (No. 1).

Husband and wife—Antenuptial agreement—Will.

A wife who under an antenuptial agreement is entitled to one third of the income of her husband's real and personal estate for life, "and in addition thereto so much of the principal as in her judgment shall be necessary for her comfortable maintenance," is entitled to the custody of the whole estate, or of the proceeds of any sale thereof, although she takes out letters testamentary as sole executrix under a subsequent will of her husband by which her enjoyment of the one-third income is reduced from life to widowhood, the will however stating "this will so far as my wife is concerned is according to antenuptial agreement hereto attached."

Argued April 14, 1903. Appeal, No. 342, Jan. T., 1903, by

Mary A. Knorr and Mildred Knorr Smith from order of C. P. Columbia Co., dismissing exceptions to auditor's report in case of Bowman et al. to use of George W. Vansiclen v. Samuel Knorr. Before MITCHELL, DEAN, FELL, BROWN and MESTREZAT, JJ. Reversed.

Exceptions to auditor's report. Before LITTLE, P. J.

The facts are stated in the opinion of the Supreme Court.

Errors assigned were in dismissing exceptions to auditor's report.

L. E. Waller, with him *C. W. Miller*, for appellant.

John G. Freeze, for appellee.

OPINION BY MR. JUSTICE FELL, May 18, 1903:

An antenuptial agreement between the testator and the appellant, who became his second wife, provided that if she survived him she should receive in lieu of dower and all claims under the intestate laws one third of the income of his real and personal estate for life, "and in addition thereto so much of the principal as in her judgment shall be necessary for her comfortable maintenance, but that at her death all property not consumed by her which she shall receive through this marriage shall go to his children and not to hers, others than such as may be the issue of the marriage herein contemplated." Six years after the marriage, the testator executed a will which gave her one third of the income of all of his estate as long as she remained a widow, with remainder to his children. Of this will she was made executrix with power to sell the real estate if she should deem it advisable to do so, during the minority of his children, and to apply the income and principal to the maintenance of herself and them. The will provided that she should not be required to file an inventory, and ended with this clause: "This will so far as my wife is concerned is according to antenuptial agreement dated October 6, 1876, hereto attached." Letters testamentary were granted to her, and she managed the estate for eleven years, when the real estate was sold by the sheriff under proceedings on a mortgage given by

the decedent. The auditor appointed to make distribution of the fund arising from the sale reported that one third of the fund should be paid to the widow upon her entering security, or in default thereof should be invested and the income thereof paid to her; one third was awarded to one of the two children of the testator; and the remaining third was awarded to a judgment creditor of the other child. This report was confirmed by the court.

The distribution made entirely ignores the antenuptial agreement. This agreement was valid, and it has not been set aside nor abrogated by the will. Without the assent of the appellant it could not be set aside, and there is no ground for the inference either of an intention on the part of the testator to set it aside or of her assent that this should be done. The will gives her exactly the same interest, as to the amount of the estate she takes, as the agreement does, and with power to sell and to use the principal for maintenance. The only change is in the period of enjoyment, from life to widowhood. Why this was made, or whether it was merely an oversight, we need not consider in view of the express declaration of the testator that as far as his wife was concerned these instruments were in accordance with each other.

The decree of the court is reversed, and it is directed that the fund be awarded the widow in accordance with the provisions of the antenuptial agreement.

Bowman *v.* Knorr (No. 2).

Decedent's estates—Judgment lien— Real estate— Distribution of proceeds of sale.

A judgment obtained on an action against an executrix begun more than five years after the death of the decedent is not a lien on the decedent's real estate, and is therefore not entitled to participate in the distribution of a fund arising from the sale of such real estate.

Argued April 14, 1903. Appeal, No. 345, Jan. T., 1903, by E. B. Brower, from order of C. P. Columbia Co., dismissing exceptions to auditor's report in case of Bowman et al., to use

of George W. Vansiclen v. Samuel Knorr. Before MITCHELL, DEAN, FELL, BROWN and MESTREZAT, JJ. Affirmed.

Exceptions to auditor's report.

From the record it appeared that Samuel Knorr died on March 2, 1889, seized of a tract of land in Centre township. On May 22, 1894, Lloyd S. Wintersteen began an action against Mary L. Knorr, executrix of Samuel Knorr, deceased, and secured a judgment for $20,167.68, which by renewals amounted on October 1, 1900 to $26,372.73. The land was sold in foreclosure proceedings on a mortgage executed by the decedent in his lifetime. J. B. Robinson, Esq., was appointed auditor to distribute the proceeds of the sale. The auditor decided that the Wintersteen judgment was not a lien, and was not entitled to participate in the fund.

Exceptions to the auditor's report were dismissed by the court.

Error assigned was in dismissing exceptions to auditor's report.

John G. Freeze, for appellant.

C. W. Miller and *L. E. Waller*, for appellees.

OPINION BY MR. JUSTICE FELL, May 18, 1903:

The appellant is the assignee of a judgment obtained on an action against an executrix which was commenced more than five years after the death of the decedent. As the debt was not a lien on the real estate from the sale of which the fund arose, the auditor was right in disallowing the claim.

The decree confirming the auditor's report on this subject is affirmed.

Wright, Appellant, *v.* Eureka Tempered Copper Company.

Practice, C. P.—Amendments—Parties—Statute of limitations.

Statutes of amendment are liberally construed to give effect to their clearly defined intent to prevent a defeat of justice through a mere mistake as to parties or the form of action. Amendments, however, will not be allowed to the prejudice of the other party, where the statute of limitations has run, by introducing a new cause of action or bringing in a new party, or changing the capacity in which he is sued. A party whose name it is asked to amend must be in court. If the effect of the amendment will be to correct the name under which the right party was sued it should be allowed; if its effect will be to bring a new party on the record, it should be refused after the running of the statute of limitations.

In an action of trespass to recover damages for personal injuries, the name of the defendant as stated in the writ was the Eureka Tempered Copper Company. Three years prior to the infliction of the injuries for which the suit was brought, the company named in the writ had failed, and its property was sold by the sheriff, but at the time of the suit it still existed as a corporation without doing any business. A new corporation known as the Eureka Tempered Copper Works succeeded to the property and business of the copper company. The plaintiff was injured while in the employ of the copper works. The service of a writ was made on the manager of the copper works, but the sheriff, following the words of the writ, returned it as served on the manager of the copper company. The error in the name was not discovered by the plaintiff until a few days after the statute of limitations had barred a new action. *Held*, reversing the court below, that permission should have been given to amend the record by striking out the word "company" and inserting the word "works."

Argued April 27, 1903. Appeal, No. 262, Jan. T., 1902, by plaintiff, from order of C. P. Erie Co., Nov. T., 1901, No. 56, discharging rule to amend record in case of Charles S. Wright v. Eureka Tempered Copper Company. Before MITCHELL, DEAN, FELL, MESTREZAT and POTTER, JJ. Reversed.

Rule to amend record. Before WALLING, P. J.

The opinion of the Supreme Court states the case.

Errors assigned were in discharging rules to amend the record and return.

George H. Higgins, for appellant.—Within certain limits any

writ may be amended so as to make it conform to the facts, for example: Where the date of service of a writ is omitted or incorrectly stated, or a mistake has been made in the name of a party or for other similar errors: Brundred v. Egbert, 164 Pa. 615; Layman v. Beam, 6 Wharton, 181; Shamburg v. Noble, 80 Pa. 158.

Amendments in furtherance of justice are always favored by the courts: Miller v. Pollock et al., 99 Pa. 202; Porter v. Hildebrand, 14 Pa. 129; Wood v. Philadelphia, 27 Pa. 502; Penn. R. R. Co. v. Keller, 67 Pa. 300; Barnet v. School Directors, 6 W. & S. 46; Wilson v. Mechanics' Savings Bank, 45 Pa. 488; Germond v. Gould, 4 Pa. C. C. Rep. 117.

George A. Allen, of *Allen & Rosenzweig*, with him *Hinckley & Rice*, for appellees.—A new cause of action cannot be introduced, or new parties brought in, or a new subject-matter presented, or a fatal and material defect in the pleadings be corrected after the statute of limitations has become a bar: Grier v. Northern Assurance Co., 183 Pa. 334; Com. v. Dillon, 81 * Pa. 41; Riley v. Ins. Co., 12 Pa. Superior Ct. 561.

Amendments may not be allowed so as to deprive the opposite party of any right; Kaul v. Lawrence, 73 Pa. 410; Leonard v. Parker, 72 Pa. 236; Trego v. Lewis, 58 Pa. 463; Furst v. B. L. Assn., 128 Pa. 183; Hettinger v. Lemberger, 1 Pa. C. C. Rep. 665.

Opinion by Mr. Justice Fell, May 18, 1903:

The Eureka Tempered Copper Company is a corporation that was engaged for a number of years in business in North East, Erie County. Its property was sold by the sheriff in 1896, and since then it has not done any business, but still exists as a corporation. In December, 1896, the Eureka Tempered Copper Works was chartered, and this corporation succeeded to the business of the copper company. In 1899, the plaintiff while in the employ of the copper works was injured, and in 1901, three days before his right of action was barred by the statute of limitations, he brought this suit to recover damages. Through a mistake of counsel the defendant named in the writ was the copper company instead of the copper works. The service of the writ was made on the manager of the latter corporation, but the sheriff, following the words of the writ, returned it as

served on the manager of the copper company. The error in the name was not discovered by the plaintiff until a few days after the statute of limitations had barred a new action. The plaintiff then obtained a rule to show cause why the record should not be amended by striking out the word "Company" and inserting the word "Works," and on the same day the sheriff petitioned for leave to amend his return so as to show service on the manager of the copper works. This appeal is from the order of the court discharging the rule to amend and dismissing the sheriff's petition.

Statutes of amendment are liberally construed to give effect to their clearly defined intent to prevent a defeat of justice through a mere mistake as to parties or the form of action. Amendments however will not be allowed to the prejudice of the other party, where the statute of limitations has run, by introducing a new cause of action or bringing in a new party, or changing the capacity in which he is sued: Trego v. Lewis, 58 Pa. 463; Commonwealth ex rel. v. Dillon, 81 * Pa. 41; Grier v. Northern Assurance Co., 183 Pa. 334; Peterson v. Delaware River Ferry Co., 190 Pa. 364: Garmon v. Glass, 197 Pa. 101. A party whose name it is asked to amend must be in court. If the effect of the amendment will be to correct the name under which the right party was sued, it should be allowed; if its effect will be to bring a new party on the record, it should be refused after the running of the statute of limitations.

In this case there is no dispute as to what was intended and what was actually done in bringing the suit. The plaintiff had never worked for the copper company. His counsel knew of the existence and the history of both companies, that one had gone out of business and had been succeeded by the other. He intended to draw a precipe for a writ against the copper works, and by mistake wrote the word "Company" instead of "Works." He served the right party, the manager of the copper works, and thus brought that company into court, but under a wrong name. The mistake in bringing the suit was in the name of the party actually summoned, and not in suing the wrong party, and the amendment should have been allowed.

The judgment is reversed with a procedendo.

Commonwealth *v.* Lenousky, Appellant.

Criminal law—Murder—Evidence—Testimony taken before a justice of the peace.

On the trial of an indictment for murder against a man who did not understand the English language, the testimony of an absent witness given at a preliminary hearing before a justice of the peace, in the presence of the prisoner and in the language which he spoke and understood, is not admissible, where it appears that the prisoner was not represented by counsel at the preliminary hearing, and was not informed of his right to cross-examine. The admission of such testimony, however, does not call for a reversal, where the only statement contained in the testimony which could affect the prisoner injuriously was abundantly established at the trial by other testimony, and was virtually admitted by the prisoner himself.

Argued March 16, 1903. Reargued April 28, 1903. Appeal, No. 48, Jan. T., 1903, by defendant, from judgment of O. & T. Luzerne Co., April T., 1902, No. 102, on verdict of guilty of murder in the first degree in case of Commonwealth v. Peter Lenousky. Before MITCHELL, DEAN, FELL, BROWN and POTTER, JJ. Affirmed.

Indictment for murder. Before WHEATON J.

At the trial it appeared that on the night of February 11, 1902, Anthony Senik, a miner, was murdered in the Exeter mines. Peter Lenousky and Victor Zorambo were arrested for the killing, and each charged the other with the murder. The testimony tended to show that they combined to do the killing for the purpose of robbery. At the trial the court admitted in evidence the stenographic testimony of Barney Polikitis given at a preliminary hearing in the office of the committing magistrate.

The court charged in part as follows:

[Gentlemen, whether Anthony Senik was murdered, is a fact for your determination. There seems to be no question, however, that such is the fact. He was found with his skull crushed and near him the bloody ax which in all likelihood was the weapon used to commit the crime. There was nothing about

the chamber to indicate death by accident. To those of us who live in the anthracite coal fields and who know the dangers to life and limb which the anthracite miner is bound to face in the ordinary pursuit of his calling, there is an added horror in the thought that it can be possible that out of the darkness of the mine may come to him sudden death at the hands of the robber and the murderer.]

Verdict and judgment of murder in the first degree.

Errors assigned were admission of testimony as above and portion of charge as above, quoting it.

P. L. Drum and *C. B. Lenahan*, for appellant.—The test is not the mere opportunity that the presence of the accused would afford for cross-examination, but there must be full opportunity—such opportunity as the accused would understand: Com. v. McLain, 99 Pa. 86; Howser v. Com., 51 Pa. 332; People v. Greenwall, 108 N. Y. 296 (15 N. E. Repr. 404).

B. R. Jones, for appellee.—The admission of the testimony of the absent witness was not erroneous: Com. v. Richards, 35 Mass. 434; Territory of Idaho v. Evans, 7 L. R. A. 646; State v. McO'Blenis, 24 Mo. 402; Summons v. State, 5 Ohio St. 325; Com. v. Cleary, 148 Pa. 26; Com. v. Keck, 148 Pa. 639; Brown v. Com., 73 Pa. 321; U. S. v. Macomb, 5 McLean, 286; Magill v. Kauffman, 4 S. & R. 317; Cazenove v. Vaughan, 1 Maule & Selwyn 4.

Opinion by Mr. Justice Fell, May 18, 1903:

At a preliminary hearing before a magistrate at which the prisoner was present, a witness was called by the district attorney and testified on behalf of the commonwealth in the language spoken and understood by the prisoner. Three weeks before the trial in the oyer and terminer this witness left the place where he had resided for several years, and a diligent search made by the court's officers failed to disclose where he had gone. At the trial, under objection made by the prisoner's counsel, the stenographic notes of the testimony of this witness, duly verified by the interpreter and the stenographer,

were read to the jury. The admission of this testimony is the subject of the first assignment of error, and gives rise to a question of grave importance in the administration of the criminal law.

Its admission is not sanctioned by section 3 of the Act of May 23, 1887, P. L. 158, because it was not taken in a court of record; and if it was admissible it is for reasons irrespective of that act. Testimony of this kind has been admitted in cases where the right of cross-examination had been exercised or had been waived. In Brown v. Commonwealth, 73 Pa. 321, the notes of the testimony of a deceased witness for the commonwealth taken at a hearing before a justice of the peace were read to the jury. It does not appear in the report of the case that the witness was cross-examined, but in referring to this case it is said in the opinion in McLain v. Commonwealth, 99 Pa. 86, that the prisoner was represented by counsel and "full opportunity was thus given for cross-examination of the witness." In Commonwealth v. Keck, 148 Pa. 639, on a trial for murder, the admission of proof of testimony of a deceased witness taken before a committing magistrate at a preliminary hearing was sustained on the ground that the testimony was taken in the presence of the prisoner and his counsel, and the witness was cross-examined.

These cases go to the extent only of approving the admission of the testimony where the right of cross-examination has been exercised or where it has been waived, with knowledge on the part of the prisoner—presumed from the presence of his counsel—that he had the right. In this case the prisoner was not represented by counsel, and was not informed of his right to cross-examine. The only testimony on this point is that of the magistrate, who when he was asked what opportunity, if any, the defendant had to cross-examine the witness, answered: "He had an opportunity if he wanted to, he was there, he listened to the whole thing, he understood it." But this opportunity amounted to nothing. The prisoner was a foreigner, acquainted with the language of the witness but not with that in which the proceedings were conducted, and ignorant of their nature and of his rights under them. There could be no waiver without knowledge, and the circumstances all indicate that the prisoner did not know of his right. In admitting the testi-

mony the court went a step in advance of the rule established by our cases. This we are unwilling to sanction.

The admission of this testimony does not however call for a reversal of the judgment. The only statement contained in it that could by any possibility affect the prisoner injuriously was that his pipe was found in the mine near the face of the chamber in which the murder was committed. That a pipe that once belonged to the prisoner was found at this place was abundantly established at the trial by other testimony that was entirely uncontradicted, and the prisoner himself admitted on the witness stand that the pipe was his, but claimed to have loaned it to Zorambo who, he alleged, was in the chamber. When this testimony was offered, no objection was made to it on the ground that any part was incompetent or elicited by leading questions. A motion was afterwards made to strike it out for these reasons. The court then allowed the counsel for the prisoner an opportunity to examine the testimony and to make specific objections to any part of it. This was not done and the motion was not pressed.

The second assignment of error does not require notice. The case was carefully and ably tried, and the record discloses no error except in the admission of the testimony referred to.

The judgment is affirmed, and it is directed that the record be remitted to the court of oyer and terminer of Luzerne county for the purpose of execution.

Knupp, Appellant, *v.* Barnard.

Land law—Surveys—Warrants—Boundaries.

The marks of a block consist of the marks, if such are found, of every tract of the block, and the marks if originally intended as corners for a particular tract become marks for locating the whole block.

The location of a block of surveys may be established from a single undoubted monument of the block on the ground if there be no others, by the courses and distances in the return; the interior tracts must then be located relatively wholly from the return of the block; but the return may show marks for corners of the interior tracks; if these be found upon the ground they establish the lines of these interior tracts although this may

to some extent disturb the lines of the block; such a location of an interior tract of a block although it may somewhat change the course of the exterior line as plotted in the return or shorten that line running from the leading warrant, yet giving effect to that fact, does not disregard the established rule, that a member of a block cannot be wrested from its position and be located outside of it; it is not thereby wrested from the block but its position is relatively the same as in the return although one of the exterior lines of the block has been for a short distance deflected from its course to accord with the established monuments on the ground of the interior tract common to it and the block of which it is a member; but there can be no block of surveys in either a popular or legal sense where the tracts are not contiguous.

In a land case where the location of two contiguous tracts of a block depends upon the position of an interior line of the block, and the evidence as to the marks of early surveys is conflicting, the case is for the jury.

Argued May 4, 1903. Appeal, No. 191, Jan. T., 1902, by plaintiff, from judgment of C. P. Warren Co., March T., 1901, No. 34, on verdict for defendants in case of W. J. Knupp v. Frank B. Barnard and E. Pequignot. Before DEAN, FELL, BROWN, MESTREZAT and POTTER, JJ. Affirmed.

Ejectment for land in Triumph township. Before LINDSEY, P. J.

The court charged in part as follows:

[Now, gentlemen of the jury, the question which you are to determine is where this land is located. The plaintiff claims that the Jacob Kortman tract and the Henry Bozar tract, and in fact all of these tracts should be located by what is known or termed in law a block survey. You will understand by this, that in the early settlement of this state, and in the early acquisition of titles, a person who desired to obtain title to a certain quantity of land made application to the commonwealth and filed his application in the land office, and while he himself was not able to obtain more than a certain quantity of land, he made application in the name of others, in the name of different members of his family and other persons, for the quantity of land which he desired, and the rights of the nominal applicants were transferred to the person making the application, and thus one person was enabled to obtain a large number of warrants of land. In this case James Wilson applied for a large number of warrants, much larger than is represented on

the plaintiff's map, and those warrants were placed in the hands of the deputy surveyor, Alexander McDowell, whose duty it was to go and survey those warrants upon the ground. His duty was as we understand the law to survey each one of those warrants and mark them on the ground, but that was not always done, sometimes the deputy surveyor only ran the outward lines of a block of warrants and then when that was done that became a block in the legal acceptation of the term. Where a large number of warrants or batch of warrants were run and marked on the ground, in addition to running the exterior lines of the block, it became and was called a block in the popular sense of the term.]

[To bring this definition more clearly before you I desire to refer to the definition of blocks as defined by the late Judge WILLIAMS of the Supreme Court, in the case of Ferguson against Bloom, 144 Pa. 549. Judge WILLIAMS was known to be an able land lawyer, and speaking of the manner in which warrants were granted by the commonwealth and the manner in which the surveys were made, he states: "When more land was desired than could be included in one tract, the person wishing to buy made application in the names of the members of his family, his servants and employees, as well as his own. When this happened, the deputy surveyor would sometimes locate the entire batch of warrants in a body, as one tract, and such a body of surveys, made at one time, for one owner, was called a block." If the surveyor discharged his duty, and marked the lines of each tract, the word "block" was sometimes used to describe the body of lands held by one owner; but in such cases the location of the tracts comprising the block was made on what may be called the individual system. If only exterior lines of the block were marked, the location of the separate tracts was practicable only upon what we have called the "block system." Further defining these two systems, he says: "If no tract corners are marked on the block lines, they must be run in accordance with the returns of survey. If corners are to be found on the block lines, these will control the courses and distances given in the returns, and the interior lines must be protracted across the block in accordance with them." Further he states: "In Mock v. Astley, 13 S. & R. 382, it was said a foundation for its application in any given case must be

laid by showing two facts: First, the existence of a block must be established 'by the production of documents showing title to the whole body. This shows a grant by the commonwealth of her title to the whole body composing the block. Next, the evidence must show that the tracts composing the alleged block were located in a body without interior lines.'" After reciting other cases, he says: "Upon the authority of these cases, and upon the principle, it is clear that if there are any interior lines on the ground they are of equal value with external ones, as they are equally the 'footprints of the surveyor,' made at the location of the tracts, and for interior members of the block. The general rule is that when there is work on the ground, made for and peculiar to a given tract, such work will control the location of the tract and fix the places of its lines." Again, "We have thus two systems for ascertaining the proper location of a survey; the natural and general one, which rests on such of the original marks made for the tract as can be found, and on the legal presumption arising from the return of survey as to such as cannot be found; and the block system, which is applicable where no internal lines were run, and where, therefore, no marks exist to guide in the location of internal tracts or lines, except such as may be found on the exterior of the block."]

[Now, gentlemen of the jury, from the definitions which I have read to you from the decision of the Supreme Court in Ferguson v. Bloom, which is almost the last case in which the systems are clearly defined by the Supreme Court, you will see that a legal block, in the legal sense I mean now, is where the exterior lines only are run and marked upon the ground. However, in the popular sense in which a block is used, it may be used where not only the exterior lines of the block or batch of surveys are run and marked upon the exterior lines, but the warrants themselves, composing the batch of surveys, the lines or corners are marked, and sometimes the lines are run upon the ground.]

With these definitions in mind let us turn to what is called here by the plaintiff a block of surveys, and see to which of these systems it belongs. The plaintiff has furnished us with a certified copy of a connected draft of warrants lying between the Randolph Spangler on the north and the James Murray on

the south. His map, which you see before you, goes farther in the block than this connected draft, and his surveys went farther north, or up the Allegheny river, than the Randolph Spangler warrant. This connected draft, and the same thing is shown by the copies of the separate warrants, shows the courses and distances running south along the Allegheny river, along all of these warrants. It shows the corners for the warrants marked by trees named in the surveyor's return of survey on a large number of the warrants, on the east along down the Allegheny river. I think there are seventeen of the warrants shown on this connected draft and some ten of them contain calls for marked trees. On the west there are still more calls for marked trees at the corners of these respective blocks, and I think only three of the warrants are without calls for corners.

[From these facts, gentlemen, it would appear that this batch of warrants as laid out by the deputy surveyor and as returned by him into the land office would not fall within the definition of a legal block. Because of these calls for marked trees along on these, separate warrants were actually made by the surveyor upon the ground, then many of these warrants, if not all of them, could be located by marks upon the ground. If this batch of surveys then are to be treated, in the location of one of the warrants, as a block in the legal acceptation of a block, it is because these corners cannot be found now upon the ground sufficient to locate the warrant under consideration.] [4]

The plaintiff has called a number of experienced surveyors who have made a survey not only of the warrants to which we have called your attention but also of other warrants in the same batch, lying to the north. They have testified to finding a hemlock tree, which is now down, but the stump or butt of the tree has been blocked and it counts back to the survey made by Alexander McDowell of these batch of warrants in 1795. That is at the north corner of the Randolph Spangler as you see it upon the map. The surveyors have gone north and have found one or more trees or marks, as I recollect it, north of that, which counted back to 1795. Coming back to the hemlock, the northwest corner of the Randolph Spangler, the surveyors on the part of the plaintiff have traced a line

from that point in a southerly direction or south along these various warrants to the James Murray tract or warrant. They testified, all of them I think, that they found no marked corners which go back to the survey of 1795 on that line.

The plaintiff has also given in evidence copies of surveys made of warrants granted by the commonwealth to different persons, lying to the west, the Eben Owens, the David Beaty, the Michael Gorman and perhaps one other. And it is claimed that these warrants although junior, located at a later period of time from the James Wilson warrants, call for the James Wilson warrants, and call for the warrants, namely, the John Kortman, Peter Kortman, Henry Kortman, Isaac Kortman and Jacob Kortman. And that they having been surveyed by a deputy surveyor of experience, who was the county surveyor of this county for many years, A. H. Ludlow, is evidence of where these warrant are located, and evidence to support his claim that the warrants are located farther north than the defendants claim, and that the Henry Bozar is where the defendants claim the Jacob Kortman to be. And in the David Beaty survey it is claimed that the call is for the Henry Bozar. The words written at the east of the David Beaty on the survey are "D. Beaty," and that is the piece of land which lies in the western part of the Jacob Kortman, as placed upon the map of the defendants and that being in the Jacob Kortman it is claimed that this is a call for the Jacob Kortman. And taking the calls made by Andrew H. Ludlow, when he located the David Beaty and the Eben Owens, it is claimed on the part of the plaintiff that it supports his theory of the location of these lots.

[Now, gentlemen of the jury, if there are no marks upon the ground by which the Jacob Kortman and the Henry Bozar can be located, then we say to you that we think resort may be had to the principles applicable to a block; and locating these warrants in that way the Randolph Spangler is the oldest warrant; that is, not going farther north than that, and that is sufficient for the purposes of applying the principles of a block survey. That is the older survey. That calls for the John Kortman, which is the next one south; that must be located then south of the Randolph Spangler; and the principle invoked applies that after twenty-one years there is a legal presumption that the warrant has been located as returned by the deputy sur-

veyor. That legal principle then would locate the John Kortman south of the Randolph Spangler, and so with each one going south.] [5]

[But it is claimed on the part of the defendants that the Jacob Kortman and the Henry Bozar warrants can be located by marks found upon the ground, or the evidence of the marks which the deputy surveyor made in 1795, which they have given you. The evidence which the defendants have produced to support this is of a white oak, which white oak is called for as the northwest corner of the Henry Bozar and the southwest corner of the Jacob Kortman.

O. W. Beaty is produced as a witness and testifies that he was on the ground with a surveyor named John Fuellhart in 1865, to run out the piece of land lying as shown by the defendants' map in the western part of the Jacob Kortman tract; and he says they went to a white oak tree which was then standing, and started at that point, and from that white oak they made the survey of what is termed the D. Beaty piece of land, in the western part of the Jacob Kortman. He states that Fuellhart commenced his survey there; that he ran around and marked that piece of land as described, that he had known of the white oak tree being there upon the ground for some time before that; that he had seen it when going to school. If I remember correctly he states that it was marked with three notches,—I don't know that he mentioned the number, but it was marked with notches—and I think he said notches to the north, to the south and to the east. You will remember that, gentlemen, for yourselves.

Mr. Henry Fuellhart is called, and he testifies that he was on the ground later with his father, John Fuellhart, and that they went to the same corner, same tree, and that his father said that was the southwest corner of the Jacob Kortman warrant. He states that his father said he had blocked it. He states that they ran a line through to the Allegheny river, perhaps ran around the entire piece first and then ran south and then ran a line through to the river. You will remember what he stated as to what he found upon that line. And that his father pronounced that the south line of the Jacob Kortman tract. Which should be, if it was, the north line of the Henry Bozar, because they call for each other and must be located

together. Now, gentlemen of the jury, I am not going to take the time to go over all of this evidence, you must remember it for yourselves.] [6]

Title papers are given in evidence, deeds which have been admitted in evidence, showing the declarations of parties who had knowledge of the lines and parties who owned the lands. Those deeds and the declarations have been commented upon by counsel and we will not go over them.

[We say to you, gentlemen of the jury, if you find that the white oak stump which is now found there upon the ground, and which is testified to by a number of surveyors on the part of the defendants, and it was also stated by O. W. Beaty—I understand that that tree was cut down later after he was there in 1865 with Mr. Fuellhart—if you find from all the evidence that that white oak stump was of the tree marked by Alexander McDowell as and for the southwest corner of the Jacob Kortman and the northwest corner of the Henry Bozar, then we say to you as a matter of law that the legal presumption will attach; that is, the legal presumption that after twenty-one years a survey is supposed to be on the ground as returned by the deputy surveyor, and the line must be run from that stump according to the courses in the return of survey to the Allegheny river, and that would constitute the line between the Jacob Kortman and the Henry Bozar and the line between the plaintiff's and the defendants' land. The Jacob Kortman survey could be closed by the application of that principle. The line would then be extended up the Allegheny river, according to the courses and return of survey, and then westerly from the Allegheny river according to the courses until it met a line extending northward from the white oak, according to its courses, and thus the survey would be joined. Now, gentlemen, this fact is for you. We give no expression at all as to what we might think about it. We have no right to. The question is for you to determine.] [7]

[The defendants in support of their position further give evidence of a pine tree which is called for in the Robert Tolbert, as the northwest corner of the Robert Tolbert and as the southwest corner of the William Tolbert. Mr. Whittekin, an experienced surveyor, is called as a witness, who testifies that in 1882, he was making a survey for a man by the name of

Shamburg and he was at that pine tree; that he blocked it and counted it and it counted back to the survey of 1795. He states that he has been there since and that the tree is down, nothing there but the stump, and part of that stump has been brought here by the plaintiff, and you have heard the evidence that has been given in relation to it. The defendants have also given evidence of having run a line from that pine eastward to the Allegheny river, and finding no marks that dated back to the survey of 1795, but finding a marked line there. And this has been received in evidence as bearing upon the question whether that pine tree was the original tree, marked by Alexander McDowell.

Now, gentlemen of the jury, what are the facts in relation to that tree? Is that the tree? If so, then the Robert Tolbert and the William Tolbert could be located from that tree by applying the principle to which I have referred, and which was so clearly explained by Judge Furst, who last addressed you and who read from a decision of the Supreme Court. It is for you to determine these facts.] [8]

[It is claimed on the part of the defendants, and there is evidence to show that from the pine to the white oak there is sufficient distance to locate all the warrants between the Robert Tolbert and the Henry Bozar. The defendants have given evidence to show from measurements made by the surveyors, that between the white oak, the northwest corner of the Henry Bozar, and the white oak at the jog in the southwest corner of the Jacob Spangler, there is sufficient land to fill all of these warrants and considerable more.] [9]

As we have said to you, gentlemen of the jury, the lines and marks upon the ground, the corners marked upon the ground, are the highest and best evidence, and that courses and distances must give way to the actual markings made upon the ground, when they can be found or the existence of them can be shown by testimony which is satisfactory to the jury. The existence of these corners where they have disappeared must be proven by testimony which is clear and which is satisfactory to the jury.

Verdict and judgment for defendants. Plaintiff appealed.

Errors assigned were (1–9) above instructions, quoting them.

A. O. Furst, *D. I. Ball* and *J. W. Wiggins*, for appellant.

W. E. Rice, of *Hinckley & Rice*, and *W. W. Wilbur*, with them *Perry D. Clark*, for appellees.

Per Curiam, May 18, 1903:

The contention in this issue turned on conflicting evidence as to the location of two tracts of land, the Henry Bozar and Jacob Kortman warrants surveyed and returned in 1795. Both were part of a large block of seventy-six warrants taken out in that year by James Wilson; it is conceded on both sides that their position in the block is that of contiguous tracts having as a division an interior line of the block which on the return of survey, as defendants claim, is a line running from a post on the Allegheny river, the eastern boundary of the block west 522 rods to a white oak marked on the return as a monument on the western line of the block; this then, by the return is also fixed as the southwestern corner of the Kortman and the northwestern corner of the Bozar. The plaintiff claimed title to about 125 acres, part of the Bozar; the defendants claimed the same land under the Kortman and the conflicting claims are determined by a proper location of the dividing line which defendants claim runs from the white oak to the river; the plaintiff claims that the white oak line is not the true interior line of division between the Bozar and Kortman, but that the true line is one tract north of it. There was a mass of conflicting evidence tending to establish each side of the controversy, and the question of fact was submitted to the jury by the learned judge of the court below in a very full and impartial charge; the jury found for defendants and plaintiff appeals preferring eighteen assignments of error.

We have examined them carefully and find no error which would warrant a reversal. Under no view of the evidence could the court have withheld it from the jury. Taking the general lines and return of the block as the evidence and the only evidence of the relative location of those two tracts the weight of it would probably sustain plaintiff's claim; but the marks of a block consist of the marks, if such are found, of every tract of the block, and the marks if originally intended as corners for a particular tract become marks for

locating the whole block. The simple question is, did the early surveyor in locating the block make the marks of these two surveys at that date as members of the block? He may establish his leading warrant by undoubted monuments maintained to this day; in running his long block lines from these monuments he may mark corners on these lines for the lines of interior tracts; in running these block lines now, it may be found that these corners are not just where designated in the block lines as returned; the distance from the leading warrant may be longer or shorter than that in the block line; it may not be in the exact course; but this variance of itself does not destroy its significance as a monument; it only demonstrates what is well known, the looseness and want of accuracy in the early surveyors, and the negligence exhibited by them in plotting and returning their surveys. In that day, land in Warren county was cheap; now the production of millions of dollars worth of oil from beneath it has made it very high priced, but nevertheless, we are compelled in ascertaining titles to take into consideration the loose methods of the early surveyors, otherwise we may make disastrous mistakes. Here, we do not undertake to decide that beyond doubt the line from the white oak to the river was the true dividing line between the two tracts; to our minds the evidence is not clear; but there was competent evidence adduced by defendants, that it was; the jury believed it as they had the right to do and we cannot disturb their verdict.

We do not concur in the distinction made by the learned judge of the court below between a popular block of surveys and a legal block. The location of a block of surveys may be established from a single undoubted monument of the block on the ground if there be no others, by the courses and distances in the return; the interior tracts must then be located relatively wholly from the return of the block; but the return may show marks for corners of the interior tracts; if these be found upon the ground they establish the lines of these interior tracts although this may to some extent disturb the lines of the block; such a location of an interior tract of a block although it may somewhat change the course of the exterior line as plotted in the return or shorten that line running from the leading warrant yet giving effect to that fact, does not dis-

regard the established rule, that a member of a block cannot be wrested from its position and be located outside of it; it is not thereby wrested from the block but its position is relatively the same as in the return, although one of the exterior lines of the block has been for a short distance deflected from its course to accord with the established monuments on the ground of the interior tract common to it and the block of which it is a member; but there can be no block of surveys in either a popular or legal sense where the tracts are not contiguous. It was not intended by us in Ferguson v. Bloom, 144 Pa. 549, nor in any other case to change or modify the law as long settled governing the location of a block of surveys and the different members of a block. While we do not concur with what the learned judge of the court below says on this subject, or rather his understanding of the language of the cases cited, we can only say that his instruction did plaintiff no harm, for he distinctly told the jury, that they must be controlled in their verdict by the evidence of the marks made in 1795 on the ground.

All the assignments of error are overruled and the judgment is affirmed.

Contas *v.* Bradford, Appellant.

Municipalities—Building laws—Fire ordinance—Wooden buildings—Reconstruction.

A city ordinance providing that within certain limits "no building shall hereafter be constructed or reconstructed, except of brick, stone, iron, or other incombustible material" does not apply to changes in a wooden building which involve a new front of galvanized iron, a ceiling and wainscoting of steel, a roof of slate in place of wooden shingles, and an increase of height of two feet and six inches without any increase of length or width.

Argued May 5, 1903. Appeal, No. 55, Jan. T., 1903, by defendants, from decree of C. P. McKean Co., Dec. T., 1902, No. 1, on bill in equity in case of A. Contas v. Bradford, Geo. H. Potter, Mayor, and Moses P. Wooley, Street Commissioner.

Before DEAN, FELL, BROWN, MESTREZAT and POTTER, JJ. Affirmed.

Bill in equity for an injunction.

MORRISON, P. J., filed the following opinion:

FINDINGS OF FACT.

1. By written stipulation dated October 25, 1902, signed by the solicitors for all parties, it is agreed that the hearing in this case shall be a final one, the printing of the bill and answer by defendant being waived, and it being agreed that the case is regularly at issue. It is further agreed if an injunction issue the bail shall be $100.

2. The plaintiff is the owner in fee of a lot of land situated on the south side of the Main street, in the city of Bradford, and having erected thereon a two-story double boarded building, twenty feet wide in front on Main street and extending back eighty feet. This building rests on stone piers and has wooden sills and floors, and a wooden ceiling, and shingle roof, and the outsides of the building covered with wooden siding. It was constructed about twenty years ago, and has become somewhat decayed, and needed new sills, new first floor, and the ceiling needed strengthening by new joists,—it needed a new roof and required painting.

3. The plaintiff made a parol contract with Frank S. Slattery to make the following repairs upon said building: To put in new joists and sills for the first floor, and a new floor, a new steel ceiling, a new galvanized iron front and galvanized bay window, to raise the building by splicing at the bottom next to the sills, two feet and six inches, so that the storeroom on the first floor would be two feet, six inches higher than at present, to paper the building upstairs and paint it and put on new shingles or slate roof and to put in new piers for the foundation if it was found that they were needed. No changes were to be made in the external sides of the building, the walls were to remain outside as they were except the raising of the same two feet six inches. The building was not to be widened or lengthened, the back room upstairs was to be made into a kitchen. The external appearance of the building was to remain the same except the galvanized iron front.

4. The plaintiff's lot and building is within the fire limits of the city of Bradford and is covered by ordinance of the city of Bradford No. 907, the material part of which so far as this case is concerned is as follows: "Within which no building shall hereafter be constructed or reconstructed except of brick, stone, iron or other incombustible material," etc. This ordinance is authorized and is in accordance with the act of assembly approved May 23, 1889, art. 5, sec. 3, cl. XL, p. 277, as amended by the act of assembly of May 16, 1901, sec. 14, p. 224.

5. That plaintiff being about to have the repairs mentioned above made upon his building was stopped by the city authorities on the ground that what he was doing was reconstruction of his wooden building, and was therefore in violation of the said ordinance and the acts of assembly.

6. The expense of constructing the plaintiff's building entire would be about $3,500, but the cost of the contemplated repairs was only $1,500.

The plaintiff has asked us to find the following facts and conclusions of law:

FACTS.

1. The work to be done by the plaintiff, as shown by the testimony in this case, does not amount to a reconstruction of the building described in plaintiff's bill. *Answer:* Affirmed.

2. That said work as shown by the evidence in this case is not a reconstruction of said building, but simply a repairing of the same. *Answer:* Affirmed.

CONCLUSIONS OF LAW.

1. The ordinance of said city of Bradford, to wit: ordinance No. 907, approved November 26, 1901, and the act of assembly approved May 23, 1889, in pursuance of which said ordinance was passed, do not prohibit the repairing of wooden buildings within the limits prescribed by said ordinance. *Answer:* Affirmed.

2. That said ordinance and the act of assembly upon which the same is predicated being in derogation of the common-law right of the plaintiff to use his property as he deems proper must be construed strictly against the city. *Answer:* Affirmed.

3. Under the law and facts in this case, the plaintiff is entitled to the injunction prayed for. *Answer:* Affirmed.

DEFENDANT'S REQUESTS FOR FINDINGS OF FACT.

1. That the defendant city of Bradford, has by ordinance No. 907, approved November 26, 1901, prescribed certain fire limits within which no building shall be constructed except of brick, stone, iron or other incombustible material, with the outer walls thereof eight inches in thickness in a building less than twenty feet to the eaves, twelve inches in thickness in a building less than forty feet, and more than twenty feet in height, and four inches additional thickness for each additional twenty feet in height and also with the roof covered with tin, iron, slate or other fireproof material. *Answer:* Affirmed.

2. That the plaintiff is the owner in fee of a certain lot of land with building thereon erected, known as No. 28 Main street in the city of Bradford and within the fire limits prescribed by said ordinance No. 907, approved November 26, 1901. *Answer:* Affirmed.

3. We do not quote defendant's request No. 3 in full here for the reason it is not in accordance with the evidence and we cannot affirm it, but it will be filed and answered in the negative.

4. The building now standing was built over twenty years ago. *Answer:* Affirmed.

5. The building is now unoccupied and unfit for occupancy. *Answer:* Affirmed.

CONCLUSIONS OF LAW ASKED BY DEFENDANT.

1. That the work which the plaintiff had undertaken to perform upon building No. 28 Main street, in the city of Bradford, is a construction or reconstruction of a building, such as is prohibited by said ordinance No. 907, of the city of Bradford, approved November 26, 1901. Answered in the negative.

2. That the plaintiff is not entitled to the relief prayed for. *Answer:* Refused.

3. That the plaintiff's bill in this case should be dismissed with costs. *Answer:* Refused.

DISCUSSION.

The sole question in this case depends upon the legal mean-

ing of the word "reconstruct" as used in ordinance No. 907 of the city of Bradford. Words of a statute, unless in some way controlled by the context, are to be considered in the ordinary and popular acceptation of the terms used. Statutes or ordinances thereunder in derogation of the common-law right of the citizen and depriving him of his common-law right to use and enjoy his property are to be considered most strictly against the public and in favor of the citizen. Penal statutes or ordinances, or ordinances and statutes penal in their character, are to be considered most strictly against the public and in favor of the citizen.

Now let us look at the meaning of the words "construct" and "reconstruct." Webster says—construct: to put together, in their proper place and order, the constituent parts of, to build, to form, as to construct an edifice, "to build." Reconstruct: to construct again, to rebuild, to form again or anew. The Century Dictionary—to construct again, to rebuild. In De Wald et al. v. Woog, 158 Pa. 497, the word "reconstruct" seems to have been judicially considered. In that case the old structure was an old-fashioned two-story house, and it seems to us the changes made were much more important and extensive than those contemplated by the plaintiff in this case, yet it is held that it was not a reconstruction or a new building or a rebuilding. In this case, Landis's Appeal, 10 Pa. 379, is cited. In this case, COULTER, Judge, says on page 380, "In the common understanding and language of the people, when we speak of the erection or construction of a house or building, we mean the erection of a new house or building, not the rebuilding of an old one."

It is a maxim with the courts that statutes in derogation of the common law must be construed strictly: Cooley's Constitutional Limitations, page 60; Brooms' Maxims, page 33.

Penal statutes must be construed strictly in favor of the accused: Bercher v. Commonwealth, 103 Pa. 528; Gallagher v. Neal, 3 P. & W. 183; Cake v. Jacoby, 2 W. N. C. 391.

Statutes for regulation of trade imposing fines and forfeitures are to be construed strictly as penal, and not liberally as remedial laws: Commonwealth v. Shopp, 1 Woodward, 123.

A municipal ordinance imposing a penalty must be construed

according to its spirit and intent. An act may be within the limit and yet no violation of the ordinance: Philadelphia v. Wright, 4 Phila. 138.

In our opinion the proper legal construction of the words "construct" and "reconstruct" found in the act of May 23, 1889, as amended by the act of May 16, 1901, section 14, page 224, and embodied in the ordinance of the city of Bradford, No. 907, is to prohibit the construction or building of a wooden structure within the limits fixed by the ordinance. That the word "reconstructed" simply has the legal effect of preventing any evasion of the prohibition created by the words "no building shall hereafter be constructed," that is to say, the ordinance cannot be evaded by claiming the right to reconstruct or rebuild a wooden building which had been demolished or destroyed either by accident or design. But the words "constructed" or "reconstructed" cannot be construed to prohibit an owner from repairing his wooden building which stands within the fire limits. And we are clearly of the opinion that the repairs contemplated by the plaintiff as set out in our findings of fact, do not amount to construction or reconstruction within the meaning of the law. The building will not be materially enlarged, in fact it will be no wider and no longer than when the repairs were begun. It will be two feet and six inches higher; but the new front will be galvanized iron and the ceiling and wainscoting will be steel, and certainly this reduces the fire risk, and the roof will be slate in place of wooden shingles. To say that the contemplated repairs amount to a reconstruction or constructing again or rebuilding of the wooden structure seems to us putting a forced and unusual meaning upon these terms. If to put a new front in a building and a new ceiling and a new roof and painting the building is a reconstruction of a building, then we do not understand the meaning of these terms. Having reached this conclusion, it follows that the plaintiff is entitled to repair his building and that the action of the city in refusing to permit him to do so is illegal and must be restrained. We are not, however, disposed to restrain the city from preventing the plaintiff from putting shingles on the building for a roof, and say that the roof must be of slate or some other noninflammable material.

DECREE.

And now, October 29, 1902, the above entitled cause coming on to be heard upon bill and answer and testimony of witnesses, and having heard the same, and the arguments of solicitors for the respective parties, upon due consideration of the premises, it is ordered, adjudged and decreed that an injunction issue restraining the defendant, the city of Bradford, George H. Potter, mayor, and Moses P. Wooley, street commissioner, and all officers, servants, agents and employees of said city from in any wise interfering with the plaintiff in the repairing of said building No. 28 Main street in said city, as set out in plaintiff's bill and in the manner shown by the evidence before the court, and the findings of fact herein, except that the defendants may require the plaintiff to roof the building with slate or some other noninflammable material.

F. P. Schoonmaker, for appellants.—To repair a building is to replace it as it was, or to restore it after an injury or dilapidation: Douglass v. Commonwealth, 2 Rawle, 262; Reading City v. Reiner, 167 Pa. 41; DeWald v. Woog, 158 Pa. 497.

George A. Berry and *Robert L. Edgett*, for appellee, were not heard.

Per Curiam, May 18, 1903:

We can add nothing to what has been so well and concisely said in demonstration of the correctness of his judgment by the learned judge of the court below. All the assignments of error are overruled and the judgment is affirmed on the opinion of the court below.

Potter County Water Company *v.* Austin Borough, Appellant.

Water companies—Boroughs—Contracts.

Where a borough has in 1897 entered into a contract with a water company by which the latter was to supply the borough with water for fire purposes and the citizens of the borough with water for domestic purposes, the borough cannot thereafter violate its contract by the erection of a waterworks for supplying itself and its citizens with water.

Constitutional law — Title of statute — Waterworks — Boroughs — Act of May 3, 1901, P. L. 140.

The Act of May 3, 1901, P. L. 140, entitled, "An act authorizing boroughs to provide a supply of water for the use of the public either by the erection and operation of waterworks, or by contracts with persons or corporations authorized to supply water within the limits of said borough, or by both methods," is unconstitutional as to its second section, inasmuch as the title gives no notice of the provisions contained in the second section.

Argued May 5, 1903. Appeal, No. 87, Jan. T., 1903, by defendant, from decree of C. P. Potter County, March T., 1901, No. 2, on bill in equity in case of Potter County Water Company v. Austin Borough, Thomas Cornish et al. Before DEAN, FELL, BROWN, MESTREZAT and POTTER, JJ. Affirmed.

Bill in equity for an injunction.

OLMSTED, P. J., filed the following opinion:

FINDINGS OF FACT.

1. I find as a matter of fact, that on October 16, 1897, the borough of Austin passed an ordinance authorizing and empowering one John P. McIntyre, acting for himself, or for a corporation formed for supplying water in the borough of Austin, his successors and assignees, to construct and maintain waterworks in said borough.

2. I find as a matter of fact, that by said ordinance the said McIntyre, or his assigns, should file with the borough clerk, within sixty days, a written acceptance of the terms of the ordinance and within one year should have the water plant in successful operation, and on filing said acceptance was to be deemed a contract between the borough and McIntyre and his successors. This also is averred in the plaintiff's bill and not denied in the defendant's answer.

3. I find as a matter of fact, that on October 16, 1897, John P. McIntyre filed with the borough clerk an acceptance of the provisions of the ordinance above cited.

4. I find, as a matter of fact, that soon after what is called the Potter County Water Company, the plaintiff in this case, was chartered, and that John P. McIntyre then assigned and

transferred all his right and interest to the privilege to him granted by said ordinance of October 16, 1897, to said company.

5. I find, as a matter of fact, that the ordinance above stated, in its first section, granted the right to John P. McIntyre, or his assigns, to lay all pipes necessary for the transportation of water for "public and domestic purposes" in said borough.

6. I find, as a matter of fact, that the line of pipe called the "iron line" had been previously constructed by private individuals in said borough and that having been transferred to the borough by the private parties, the said borough agreed to deliver to said McIntyre, the free and uninterrupted possession of said "iron line" and that McIntyre agreed to furnish water for fire purposes free for the fifteen hydrants then located in said borough, and that the borough agreed to rent of McIntyre such additional hydrants as might be necessary for fire protection for the term of the ordinance, and pay the said McIntyre or his successors an annual rental of $15 each for such additional hydrants.

7. I find, as a matter of fact, that soon after the acceptance of said ordinance, and the incorporation of the Potter County Water Company, that the said water company proceeded to construct and operate a water plant in the borough of Austin, laying pipes, putting in hydrants and furnishing water to the people of Austin for domestic purposes and to the public for fire purposes, said work being completed within one year as required and is being operated by the Potter County Water Company to the present date.

8. I find, as a matter of fact, that after the filing of the plaintiff's bill in this case, and the granting and service upon them of the rule to show cause why preliminary injunction should not issue, to wit: on June 17, 1901, the borough council passed an ordinance providing for an election to be held on July 30, for the purpose of determining whether an indebtedness of $19,769.40 should be incurred for the purpose of erecting a water system for said borough of such capacity as may be required to supply water for fire purposes and to supply its citizens with pure spring water for fire and domestic use.

9. I find that this election was advertised and held, and a majority voted in favor of such increase of indebtedness.

10. I find, as a matter of fact, that no actual work has yet been done upon the ground in the construction of said plant, but that the authorities of the borough intend so to do, and that the borough council has advertised for bids for bonds of the borough, the avails of the sale of said bond to be used in the construction of said plant.

11. I do not find from the evidence that the borough of Austin is indebted in any amount whatever, but I do find that the assessed valuation of said borough is $282,620.

12. I find that the iron line was turned over to the plaintiffs by the borough as was required by the ordinance of 1897, and was connected with the other lines of the plaintiff company and that the plaintiff has furnished water through the said lines as required by the ordinance of 1897.

13. I find, as a matter of fact, that sometime in the year 1893 or 1894 some citizens of Austin borough, who were styled the board of trade, entered into an agreement with the Messrs. Goodyear (a lumber manufacturing company at Austin), by which it was agreed that the committee should lay a pipe some half a mile or mile long down through the Goodyear piling grounds for the protection of his lumbermen from fire. In consideration of which the Goodyears were to locate car shops at Austin. This line was built and appears to have been connected with the plaintiff's lines. This line was not laid in the streets of Austin, but is entirely on the lands of Goodyear. It appears from the evidence to be managed and controlled by the Goodyears, and I do not find anything in the evidence connecting the Potter County Water Company with the transaction.

FINDINGS OF LAW.

Answers to the request of the counsel for the plaintiffs, for findings of law:

1. That the facts proved in this case show such a contract and proceedings between the borough of Austin and the Potter County Water Company as prevents the borough from erecting a municipal water plant of its own for supplying itself with water for fire purposes or its citizens with water for

domestic purposes. *Answer:* This request is answered in the affirmative.

2. That the said borough cannot erect a municipal water plant to supply its citizens with water for domestic purposes or to supply for fire purposes under the provisions of the act of assembly approved May 3, 1901, P. L. 140, as the same is unconstitutional for the reason that the title gives no notice of the provisions contained in the second section of said act. *Answer:* This request is answered in the affirmative so far as to declare the second section of the act of 1901 so far as it attempts to avoid existing contracts, unconstitutional, but we decline to declare the whole of said act unconstitutional for the reasons assigned in this request.

3. That the borough cannot erect a municipal water plant to supply its citizens with water for domestic purposes, under the provisions of the act of assembly approved May 9, 1901, P. L. 140, as the same is unconstitutional for the reason that the second section of the same is unconstitutional. *Answer:* I affirm the third request so far as to declare that the second section of the act of 1901 unconstitutional as to contracts existing at the time of its passage.

4. That the borough cannot erect a municipal water plant to supply its citizens with water for domestic purposes or to supply water for fire purposes under the provisions of the act of assembly approved May 3, 1901, P. L. 140, for the reason that the said act is prospective only and does not apply to this case where a contract existed at the time of the passage of the act of assembly and is still in force; that if the act should be held not to be prospective but to apply to this case, or cases like this where contracts existed for the supply of water between a borough and a water company at the time of the passage of the act and still existing, it is unconstitutional as impairing the obligation of contracts under the tenth section of the first article of the constitution of the United States. *Answer:* This request is affirmed so far as to declare the second section of the act of 1901 unconstitutional so far as it violates existing contracts.

DISCUSSION.

This case is but a repetition of No. 1, September term, 1902.

In that case I have filed a short opinion giving my conclusions of the law as applicable as well to this case as to the one where it was filed. It is difficult to tell why two cases should be brought and tried at great length between substantially the same parties, involving the same questions. Such practice leads to confusion more than it aids in determining either law or facts. The evidence was given in full in both cases, answers having been filed in both cases and at the last hearing it was agreed by and between the parties that the case should be decided by the court the same as though upon the final hearing of the bill as nothing could be gained by intermediate appeal. I think the ordinance of October 16, 1897, construed with the acceptance by McIntyre and the subsequent construction and operation of the water plant concludes the borough. It was an exercise of the right formerly in the borough, and the borough cannot disregard the contract and destroy the $40,000 invested in the water plant. I think further that the second section of the act of assembly of 1901 is unconstitutional so far as it undertakes to effect the contract then existing between the water company and the borough, and that the plaintiff is entitled to an injunction restraining the borough from constructing a water plant either for fire or domestic service, as the ordinance, above cited, clearly applies to the one as much as the other.

The counsel for the plaintiff will prepare and submit an injunction in this case restraining the borough from constructing a water plant for the purpose of furnishing water either for fire or domestic service.

Error assigned was the decree of the court.

W. I. Lewis, with him *F. E. Baldwin*, for appellants.

Walter Lyon, of *Lyon, McKee & Mitchell*, with him *Seibert & Lillibridge*, for appellees.

Per Curiam, May 18, 1903.

The decree of the court below in this case is clearly right for the very manifest reasons set out by the learned judge of that court in his opinion filed. On that opinion the decree is affirmed.

Carson *v.* Austin Borough, Appellant.

Argued May 5, 1903. Appeal, No. 88, Jan. T., 1903, by defendants, from decree of C. P. Potter Co., Sept. T., 1902, No. 1, on bill in equity in case of E. E. Carson et al. v. Austin Borough et al. Before DEAN, FELL, BROWN, MESTREZAT and POTTER, JJ. Affirmed.

PER CURIAM, May 18, 1903:

The questions raised by this bill and answer are the same as those in Potter Co. Water Co. v. Austin Boro., ante, p. 297. We affirmed that decree on the opinion of the court below, and we do the same in this case.

Decree affirmed.

Gray, Appellant, *v.* Citizens' Gas Company of Port Alleghany.

Equity—Jurisdiction—Adequate remedy at law.

In modern equity practice a complainant in a court of equity cannot be turned out of court for want of jurisdiction merely because he has a remedy at law; it must be shown further that his remedy at law is adequate.

Where on an appeal from a decree dismissing a bill in equity for want of jurisdiction, the opinion of the court below and the record are so meagre that the appellate court cannot determine whether the plaintiff had or had not an adequate remedy at law, the decree will be reversed, and the record remitted for further proceedings.

Argued May 5, 1903. Appeal, No. 119, Jan. T., 1903, by plaintiff, from decree of C. P. McKean Co., June T., 1902, No. 2, dismissing bill in equity in case of John G. Gray and Carl R. Bard, trading as Gray Chemical Company, v. Citizens' Gas Company of Port Alleghany. Before DEAN, FELL, BROWN, MESTREZAT and POTTER, JJ. Reversed.

Bill in equity for specific performance of a contract for supplying natural gas to a chemical factory.

From the record it appeared that no hearing was had upon the merits, but by agreement of counsel a hearing was had before LINDSEY, P. J., specially presiding, on the question of jurisdiction raised by the answer. The court in a short opinion dismissed the bill for want of jurisdiction.

Errors assigned were as follows:

1. The learned court erred in refusing to take jurisdiction of the case.

2. The learned court erred in dismissing the plaintiff's bill for the reasons contained in the 4th section of the 29th paragraph of defendant's answer, which section is as follows:

"That specific performance of a contract of this character cannot be enforced for the reason that the contract is continuous, lasts for so long a time as gas can be procured from the territory which the Peoples' Gas Company had at the date of the making of said contract or thereafter acquired and would require a constant supervision and oversight by the court, which supervision and oversight by the court it is impossible to give and would involve a large amount of detail as to the matter of the number of wells to be drilled, size of lines to be laid, quantity of gas to be furnished and other matters relating to the corporate business of defendant company which the court has neither the time nor power to supervise, conduct or control."

3. The learned court erred in dismissing plaintiff's bill for the reasons contained in the 5th section of the 29th paragraph of defendant's answer, which section is as follows:

"That the plaintiff by its own bill shows that it has an adequate remedy in law, said bill assuming to estimate the damages which have been sustained and thereby showing to the court that the damages are capable of ascertainment, and therefore the plaintiff, if it has suffered any damage, can be compensated in an action."

4. The learned court erred in dismissing plaintiff's bill.

John G. Johnson, with him *H. N. Rose*, *Sheridan Gorton* and *Thomas F. Richmond*, for appellant.

F. D. Gallup, with him *George A. Berry* and *Robert L. Edgett*, for appellee.

PER CURIAM, May 18, 1903:

The question raised in this case is not alone whether plaintiff has a remedy at law, for that remedy it clearly has, but whether in view of the facts it is an adequate one. It may be conceded, that the time is not very remote in our judicial history, when a wronged party sought the intervention of equity, and he could be truthfully met by the reply, you have a remedy at law in action for damages, such reply would have been the end of his bill; he would have been turned out of court for want of jurisdiction. But this answer is no longer conclusive as to the jurisdiction; courts now go further and inquire, whether under the facts the remedy at law is not vexatiously inconvenient and whether it is so proximately certain as to be adequate to right the wrong complained of. In this case the court below giving only very meagre reasons, and without citing a single authority, dismissed plaintiff's bill, for want of jurisdiction. The learned judge says he had before him very full briefs of the opposing counsel and his decree is based on his conclusions from these briefs; what they contained by way of reason and authority we are not informed; it is simply impossible on this appeal to satisfactorily review the question at issue from the record before us. The court below should have all the material facts, either found or agreed upon, before it, preliminary to its decree and so should we. Necessarily our opinion now must be brief, for we must carefully avoid prematurely intimating a decision, before the facts necessary to an intelligent and lawful decree are before us. We can only say now, that the court may or may not have jurisdiction. We do not know.

The appeal is sustained and decree reversed; it is directed that the bill be reinstated and the record be remitted to the court below for further proceedings as suggested in this opinion.

Wheeler *v.* Knupp, Appellant.

Tax sales—Payment of tax by agent—Redemption.

A tax title cannot be sustained where it appears by the books of the treasurer and by other records that an agent of the owners of unseated land bought in the land at a tax sale, that the taxes had been regularly assessed, and that the agent before the maturity of the deed paid taxes, and that these had been accepted by the treasurer.

Argued May 5, 1903. Appeal, No. 59, Jan. T., 1903, by defendants, from judgment of C. P. Warren Co., March T., 1902, No. 43, on verdict for plaintiffs in case of N. P. Wheeler and John Dusenbury v. W. J. Knupp, William I. Bachop, J. H. Osmer and John Knupp. Before DEAN, FELL, BROWN, MESTREZAT and POTTER, JJ. Reversed.

Ejectment for a tract of land in Watson township. Before LINDSEY, P. J.

The facts appear by the opinion of the Supreme Court, and by the former report of the case, Knupp v. Syms, 200 Pa. 489.

The court gave binding instructions for plaintiffs.

Verdict and judgment for plaintiffs. Defendant appealed.

Error assigned amongst others was in refusing binding instructions for defendants.

J. H. Osmer, with him *N. F. Osmer* and *W. J. Knupp*, for appellants.

D. I. Ball, with him *W. D. Brown* and *W. E. Rice*, for appellees.

PER CURIAM, May 18, 1903:

This was an ejectment in the court below for the undivided half of about 100 acres of land in Watson township, Warren county. The case was here before and is reported Knupp v. Syms, 200 Pa. 489. We held in that case reversing the judgment, that the evidence that the tax on default of payment of which the land had been sold at treasurer's sale, had been

in fact paid before the maturity of the treasurer's deed and that this was equivalent to a redemption; consequently Hodges took nothing by the alleged treasurer's deed purporting to be on a sale for taxes of 1848. A motion for a reargument of that case was made; it in substance advanced all the additional reasons put forth now for a change in the judgment; upon full and careful consideration we overruled the motion and refused to disturb the judgment for plaintiffs. On that record being remitted to the court below, the defendants in case at once brought ejectment, as they, there having been but one judgment, had a clear legal right to do. At the trial, the court was of opinion, there had been such change in the proof as warranted a different result, directed a verdict for plaintiffs in this suit, which is equivalent to a reversal of our judgment in the first one. While the learned judge of the court below disclaimed any disrespect towards or any intentional disregard of the opinion of this court in the former case, we think possibly his settled belief of the correctness of his own opinion in the first case, to some extent, perhaps, warped his judgment in this. After a careful perusal of the testimony before us, and a comparison with that in the former case, we see no substantial change in the material facts as we then found them and on which our judgment was based. The appellants' eleventh assignment of error is therefore sustained, the judgment is reversed and judgment is now entered for appellants in this court and for defendants in the court below.

Barclay, Appellant, *v.* Barclay.

Practice, C. P.—Pleading—Statute of limitations—Amendment.

The statute of limitations is a defense upon facts, and must be pleaded. It cannot be made by a demurrer which raises only an issue of law. It is not a defense absolute of which the court will take judicial notice on the plaintiff's presentation of his case, either in his declaration or at the trial, for if the defendant does not choose to make it, it is not a part of the case at all. And the only way the defendant can make it is by plea.

The defense of the statute of limitations cannot be raised by demurrer

either at common law, or under the practice act of May 25, 1887, P. L. 271.

In an action upon a promissory note brought six years after the expiration of the date of the note where the statement avers that the defendant has always refused to pay the note, and an amended statement filed by leave of court sets forth facts sufficient to remove the prima facie bar of the statute of limitations, it is error for the court to enter judgment for defendant on the amended statement on the ground of the inconsistency between the two statements. In such a case the amended statement is the only one before the court.

Argued Jan. 26, 1903. Appeal, No. 303, Jan. T., 1902, by plaintiff, from judgment of C. P. No. 1, Phila. Co., March T., 1901, No. 1258, on demurrer to statement in case of William K. Barclay v. John K. Barclay. Before MITCHELL, DEAN, BROWN, MESTREZAT and POTTER, JJ. Reversed.

Demurrer to amended statement.

The record showed that the suit was brought on a promissory note for $6400 dated July 30, 1888. The writ issued April 1, 1901. In the original statement plaintiff averred "that the defendant has always refused to pay the amount of said note, or any part thereof." The defendant demurred on the ground that the statement showed upon its face that the action was barred by the statute of limitations. The court permitted an amended statement to be filed which contained the following averment:

The said promissory note was duly presented for payment at No. 407 Locust street and payment on the same duly demanded of a proper person according to the tenor of said note but payment thereon was refused.

And thereafter, at various times within six years of the time when this suit was brought, defendant admitted his liability to the plaintiff therefor and acknowledged to the plaintiff's agent that the above note was an existing indebtedness and that he was liable thereon to the plaintiff for the amount thereof with interest, but defendant has never paid the same or any part thereof, wherefore this suit is brought.

A demurrer to the amended statement was filed which the court sustained.

Error assigned was the judgment of the court.

Henry Budd, with him *George Gluyas Mercer*, for appellant.—A demurrer can raise questions of law only, and the bar of the statute of limitations is a question of fact; and to permit such a defense to be raised by demurrer would violate the purposes of the act of 1887, and every principle of pleading, by requiring the pleading of anticipatory matter: Condon v. Enger, 113 Ala. 233 (21 So. Repr. 227); Barringer v. Warden, 12 Cal. 311; Bowman v. Mallory, 14 Ind. 424; Matlock v. Todd, 25 Ind., 128; Sleeth v. Murphy, 1 Morris (Iowa), 321; Zane v. Zane, 5 Kan. 134; Allen v. Word, 25 Tenn. 284; Boggs v. Bard, 2 Rawle, 102; Heath v. Page, 48 Pa. 130; Peck v. Whitaker, 103 Pa. 297; Gould v. Gage, 118 Pa. 559; Murdock v. Martin, 132 Pa. 86; Barr v. McGary, 131 Pa. 401.

The learned court below erred in sustaining the demurrer to the amended statement, and in entering judgment for the defendant thereon, because the averments of the amended statement were sufficient to remove the prima facie bar of the statute of limitations: Yaw v. Kerr, 47 Pa. 333; Palmer v. Gillespie, 95 Pa., 340.

The amended statement filed in the case at bar was filed as a substitute for the statement originally filed and not as a mere amendment to the latter. It is complete in itself and does not in any way refer to the original, or depend upon it to supplement its allegations: Gilman v. Cosgrove, 22 Cal. 356; Jones v. Frost, 28 Cal. 245; La Societe Francaise v. Wiedmann, 97 Cal. 507 (32 Pac. Repr. 583); McEwen v. Hussey, 23 Ind. 395; Kirkpatrick v. Holman, 25 Ind. 293; Specht v. Williamson, 46 Ind. 599; Westerman v. Foster, 57 Ind. 408; Thompson v. Toohey, 71 Ind. 296; Bates v. Kemp, 12 Iowa, 99; Seneca County Bank v. Garlinghouse, 4 How. Pr. (N. Y.), 174; Wells v. Applegate, 12 Oreg. 208 (6 Pac. Repr. 770); Kay v. Fredrigal, 3 Pa. 221; Roderick v. B. & O. R. R. Co., 7 W. Va., 54.

W. B. Bodine, with him *G. W. Pepper*, for appellee.—This question has not been passed upon by this court; but now that the plaintiff is required to file a concise statement of his demand, he is required to aver the correct date of the accruing of the action; and there is no reason why, if this date is more

than six years before the bringing of suit and there are any facts to take the case out of the statute, such facts should not be averred: Focht v. Reading Stove Works, 21 Pa. C. C. Rep. 524; Crawford v. Schaeffer, 22 Pa. C. C. Rep. 79.

It is submitted that, in the absence of mistake or some explanation, plaintiff cannot file an amended statement swearing to facts which are contradictory to the facts of his original sworn statement, which (if they existed) he must have known when he swore to the original statement denying their existence, and which he has since learned to be essential to his recovery: Hidell's App., 9 W. N. C. 212; Baker's App., 3 Atl. Repr. 766; Fyan v. Cessna, 10 Atl. Repr. 29.

If, then, a plaintiff may not, in the absence of mistake, swear in an amended statement to facts contradictory to the original statement; and if a plaintiff under "leave to amend" files an amended statement directly contradicting the averments of the original statement, it seems clear that the defendant need not go to trial upon the amended statement. It may be that his proper course is to move to strike the amended statement from the record.

Opinion by Mr. Justice Mitchell, May 25, 1903:

The procedure act of May 25, 1887, P. L. 271, introduced clumsy and unscientific methods into the legal statements of the parties, by the plaintiff of his cause of action and by defendant of his defense, but it did not go so far as to overturn and confuse the fundamental principles of pleading by requiring the plaintiff to set out his evidence or anticipate the defense.

The statute of limitations is a defense upon facts, and must be pleaded. It cannot be made by a demurrer which raises only an issue of law. It is not a defense absolute of which the court will take judicial notice on the plaintiff's presentation of his case, either in his declaration or at the trial, for if the defendant does not choose to make it, it is not a part of the case at all. And the only way the defendant can make it is by plea. A single illustration will suffice. At the trial the plaintiff might prove the signature of defendant, put the note in evidence and rest with a completed case. If defendant gave no evidence, the verdict must be for plaintiff without regard

to the date of the note. And if defendant had not pleaded the statute of limitations he could not make that defense. The act of 1887 has made no change in this respect. It is very notable that neither the court below nor the learned counsel for the defendant appear to have remembered that the act expressly recognizes the plea of the statute of limitations. Section 7, after providing that non assumpsit shall be the general issue, continues, "the defendant in the action of assumpsit shall be at liberty, in addition to the plea of non assumpsit, to plead payment, set-off, and also the bar of the statute of limitations." Under this provision, as at common law, the bar of the statute of limitations is not raised by the general issue, but must be specially pleaded. The act directed that "special pleading is hereby abolished," but it was a vain and futile direction which abolished only the name, the substance is inherent in the nature of litigation and cannot be destroyed by the reforming panacea for imaginary ills, of calling things essentially different by the same name. Some glimmering of this fact seems to have entered the mind of the legislature in passing the act. The general intent undoubtedly was, badly as it was carried out, to simplify and make the pleadings more direct, so that each side should know the exact point of controversy raised by the other. The general issue on a promissory note meant in plain terms that defendant never promised to pay. But if plaintiff came to trial prepared to prove the promise, and was there met by an admission of the promise by the signature but a denial of any promise within six years, he was at an unfair disadvantage by a defense of which he had no notice. To prevent this injustice the act expressly retained special pleading as to the statute of limitations.

Both on the general principles of pleading, therefore, and on the express provisions of the procedure act, the court below was in error in sustaining the defense of the statute of limitations on a demurrer.

It was even more pronounced error to sustain the demurrer to the amended statement. That statement having been allowed and filed was the only one before the court, and it set up a good cause of action even under the erroneous view of the court in requiring it. The inconsistency with the first

statement was purely formal and theoretical. A promise—in words—to pay, and a refusal—in fact—to do so are not practically inconsistent, and unfortunately not unknown in common experience. But even if the inconsistency had been substantial and had appeared on the face of the amended statement it was not demurrable. Neither declarations nor pleas are required to be consistent. Nothing could be less so than non assumpsit and payment, yet they are allowed to be joined under the statute as well as at common law. The common counts for goods sold and delivered, and for goods bargained and sold, but refused to be accepted, were nearly always joined, and there is no good reason why they should not both be used now in the same statement. If the fact of delivery or refusal to accept is the one really in controversy, the plaintiff must be allowed to state his cause of action in both ways or be subject to the risk of failing on the want of correspondence between the allegata and the probata. The case of Guarantee Trust, etc., Co. v. Farmers', etc., Bank, 202 Pa. 94, has no bearing on this, as that was an action in tort, and by the agreement of parties was decided on the fundamental and controlling question as to when the statute of limitations began to run.

Judgment reversed and demurrer directed to be overruled, with leave to defendant to plead issuably.

McCollum *v.* Carlucci, Appellant.

Partnership—Suits—Breach of contract—Assumpsit.

While partnership accounts must be adjusted and settled and the liability of one partner to another ascertained by an action of account render, or by a bill in equity, this does not prevent one partner from suing another in assumpsit for damages resulting to the plaintiff from the dissolution of the partnership, wrongfully brought about by the bad faith and broken promises of the defendant.

In an action of assumpsit by one partner against another to recover damages for breach of the contract and wrongful dissolution of the partnership, a verdict and judgment for plaintiff will be sustained where the evidence, properly admitted, tends to show that the defendant had advised the men who had been employed by the firm in a quarry to bring suits against it, obtain judgments and sell out the partnership property, which

he himself purchased; that he said the partnership was at an end; that he obtained an assignment of the lease of the quarry to plaintiff as well as of the farm on which the quarry was located, and entered judgment against plaintiff for default in payment of rent and issued execution on it; that he purchased the farm, and, with a new partner, opened a quarry close to the plaintiff's quarry and was operating it at the time of the trial; and that, when the plaintiff sold stone to get money to pay the men, he notified the parties to whom stone had been sold not to pay him.

In such a case the measure of damages is not the value of the quarry nor the plaintiff's share of the profits which the defendant made, but the value of the partnership to the plaintiff.

Argued March 18, 1903. Appeal, No. 15, Jan. T., 1903, by defendant, from judgment of C. P. Susquehanna Co., Nov. T., 1900, No. 57, on verdict for plaintiff in case of A. H. McCollum and A. B. Smith, Executors of H. W. Lord, Deceased, v. Frank Carlucci. Before MITCHELL, DEAN, FELL, BROWN and POTTER, JJ. Affirmed.

Assumpsit for breach of partnership agreement. Before SEARLE, P. J.

The facts appear by the opinion of the Supreme Court.

The court refused binding instructions for defendant.

Verdict for plaintiff for $4,000 on which judgment was entered for $1,800, all above that amount having been remitted.

Error assigned amongst others was in submitting the case to the jury, and that the charge was inadequate as to the measure of damages.

G. P. Little and *W. W. Watson*, with them *R. B. Little* and *S. L. Tiffany*, for appellant.—Actions between partners cannot be maintained, involving partnership business and transactions, until the status of the partners and their liability to each other has been settled by action of account render, or bill in equity: Kease v. Bright, 71 Pa. 186; Leidy v. Messinger 71 Pa. 177; Crow v. Green, 111 Pa. 637; Murray v. Herrick, 171 Pa. 21; Ferguson v. Wright, 61 Pa. 258.

While it is true, that in the charge the court stated to the jury that damage against defendant could be allowed only for loss of partnership, we say, it was impossible for the jury, under

this instruction, to arrive at an intelligent conclusion. And, while it may be claimed this instruction remedied the difficulty, that is not correct, as this court has decided in numerous cases, that if the general effect of the charge has a tendency to mislead, it is cause for a reversal, even if no particular portion of the charge be erroneous: Frisbie v. McFarlane, 196 Pa. 110; Lerch v. Bard et al., 177 Pa. 197; Peirson v. Duncan et al., 162 Pa. 187; L. V. R. R. Co. v. Brandtmaier, 113 Pa. 610; Fullam v. Rose, 181 Pa. 138; Richards v. Willard, 176 Pa. 181.

A. H. McCollum, of *McCollum & Smith*, for appellee.—Covenant and not account render is the proper action for the breach of a contract of partnership, in wrongfully dissolving the partnership, and for wrongful acts tending thereto: Addams v. Tutton, 39 Pa. 447; Reiter v. Morton, 96 Pa. 229.

Opinion by Mr. Justice Brown, May 18, 1903:

If this suit were for an accounting by Carlucci, the appellant, to the estate of Lord, his late partner, the judgment would have to be reversed. Partnership accounts must be adjusted and settled and the liability of one partner to another ascertained by an action of account render or by a bill in equity: Ferguson v. Wright, 61 Pa. 258; Leidy v. Messinger, 71 Pa. 177; Crow v. Green, 111 Pa. 637; Murray v. Herrick, 171 Pa. 21.

The cause of action, as set forth in plaintiff's statement, is, that the appellant broke all of his covenants in the partnership agreement, and this suit is not for an accounting, but for damages resulting to Lord from the dissolution of the partnership, wrongfully brought about by the bad faith and broken promises of Carlucci. In other words, the claim of Lord's estate is not for a share of the profits of the business which he and Carlucci, by their agreement of December 2, 1899, were to carry on, nor is it for an accounting from Carlucci as a partner. The contention of the plaintiff below was, that, as a result of the broken promises of Carlucci, the partnership was wiped out and profits that might have come from the business were never realized. If Carlucci had kept faith with Lord and the partnership had continued, whether profitable or unprofitable, the accounts between the partners would have to be settled in the

regular way. The finding of the jury has sustained Lord's contention that the partnership was wrongfully dissolved by Carlucci, and the representatives of his estate are not asking for an accounting, but for damages resulting from Carlucci's broken covenants and wrongful dissolution of the partnership. The remedy for the wrong sued for is neither an action of account nor bill in equity, but is in assumpsit on the broken contract: Addams v. Tutton, 39 Pa. 447.

The jury were instructed by the learned trial judge, first, that before Lord could recover, it was incumbent on him to show he had performed all of his covenants and had been willing to go on and work the quarry and pay one half of the debts and expenses; and, secondly, that the evidence would have to satisfy them that Carlucci had wrongfully dissolved the partnership. Without referring to the testimony in detail, it is sufficient to say that a careful examination of it has persuaded us that the jury were justified in their finding that Lord had performed his covenants, and that Carlucci had not only not done so, but had wilfully and wrongfully dissolved the partnership. As evidence of his wilful purpose to wrongfully force the dissolution, the court, under Addams v. Tutton, supra, properly allowed the plaintiff to show that the defendant had advised the men who had been employed by the firm to bring suits against it, obtain judgments and sell out the partnership property, which he himself purchased; that he said the partnership was at an end; that he obtained an assignment of the lease of the quarry to Lord as well as of the farm on which the quarry was located, and entered judgment against Lord for default in payment of rent and issued execution on it; that he purchased the farm, and, with a new partner, opened a quarry close to the Lord quarry and was operating it at the time of the trial; and that, when Lord sold stone to get money to pay the men, he notified the parties to whom stone had been sold not to pay him.

We have discovered no error in any of the rulings on offers of evidence, and the only other question is as to the correctness of the court's instructions on the measure of damages, which were: "Now, as to the value of this contract, you cannot go to work and evolve prospective profits, and figure up what should be the speculative profits in the future, but the

question is, what was that contract worth to Mr. Lord? That is the measure of damages. Not what it would sell for, but what was it worth? That is something which is very hard to determine. In the first place, we think, if he dissolved the contract wrongfully, without any cause, he should be required to pay nominal damages for its dissolution and whatever actual damages Mr. Lord sustained by reason of it. Those damages are not the value of the quarry. What would this firm make out of the quarry in running it? If they both ran it and performed the covenants of this lease, was there any profit in running it? If so, what was the share of the profits of Mr. Lord, the plaintiff? But you cannot figure up his share of the profits and say that is the actual damages. You will take the value of the contract, itself; arrive at it by such method of figuring as you can, and determine what was the value of this article of copartnership to Mr. Lord at the time of the dissolution of the contract. That is the basis upon which you are to work in awarding damages. . . . In ascertaining the value of the partnership, of course you may take into consideration what was done there that year—the business that the partnership did—and ascertain as best you can what the value of that partnership was to Mr. Lord, if any, provided you find that Mr. Carlucci wrongfully dissolved the partnership, and render your verdict in a gross sum for the amount that you shall find that he was damaged, with interest from the date of the damage sustained, or from the dissolution of the firm, up to this date." It would have been difficult for the court to have given more definite instructions under the testimony in the case, and as the defendant did not ask anything more definite, the charge on that point ought not to be complained of.

The verdict was for $4,000. On a motion for a new trial, the careful judge, feeling that the damages were in excess of what was warranted by the evidence, and that the jury might have, to some extent, misunderstood the instructions as to the measure of damages, reduced the verdict to $1,800. There was evidence that Lord had made about $2,000 above expenses in operating the quarry the year before he entered into the contract with Carlucci; and, in the exercise of its discretion in disposing of the rule for a new trial, the limit in reducing the verdict was reached by the court below. As the case was

fairly and properly tried, under adequate instructions to the jury, and no injustice has been done to the appellant, in view of the reduced verdict, the judgment entered below is affirmed.

McFarlane, Appellant, *v.* Kipp.

Partnership—Parties—Joint action—Res adjudicata—Judgment.

Where in an action by a partnership, the defendants set up a claim against the partnership, and secure a certificate in their favor upon which judgment is entered, they cannot maintain a second suit on exactly the same cause of action against one of the plaintiffs in the first suit and two other persons alleged to be partners, but not parties plaintiff in the first suit.

Argued March 19, 1903. Appeal, No. 60, Jan. T., 1903, by plaintiffs, from judgment of C. P. Bradford Co., Sept. T., 1899, No. 238, for defendant non obstante veredicto in case of James McFarlane & Company v. H. E. Kipp, G. W. Kipp and E. F. Kizer, trading as Hiram Frisbie & Company and G. W. Kipp & Company. Before MITCHELL, DEAN, FELL BROWN and POTTER, JJ. Affirmed.

Assumpsit against a partnership. Before NILES, P. J.

The facts appear by the opinion of the Supreme Court.

Error assigned was in entering judgment for the defendants non obstante veredicto.

A. T. Freedley and *D. C. De Witt*, with them *I. McPherson*, for appellants.—The record and judgment in the former action is not a bar to a recovery in the present action: Baker v. Small, 17 Pa. Superior Ct. 423.

Identity of parties does not exist: Shafer's App., 99 Pa. 246; Fagely v. Bellas, 17 Pa. 67; Allen v. Union Bank of Louisiana, 5 Whar. 420; Hampton v. Broom et al., 1 Miles, 241; White v. Smith and Robinson, 33 Pa. 186; Sheble v. Strong et al., 128 Pa. 315; Rundell v. Kalbfus, 125 Pa. 123.

The fact that Horace E. Kipp was a member of the firm

against which the former judgment has been recovered, and is a member of the firm against which the verdict in the present action has been rendered, does not prevent the entry of judgment on the verdict in favor of the plaintiffs: Wallace v. Fairman, 4 Watts, 378; Potter v. McCoy, 26 Pa. 458.

Inasmuch as the former judgment against Horace E. Kipp was not recovered against him as a member of the firm sued in this action, the case does not come within the letter of the acts of 1830 and 1848: Vaneman v. Herdman, 3 Watts, 202, 203; Moore v. Hepburn, 5 Pa. 399; Moore's Appeal, 34 Pa. 411; Miller v. Reed, 27 Pa. 244; Campbell v. Steele, 11 Pa. 394; Bowman v. Kistler, 33 Pa. 106.

William Maxwell and *Rodney A. Mercur*, with them *James H. Codding* and *William T. Davies*, for appellees.—A judgment recovered against one partner is a bar to a subsequent suit against both, though the new defendant was a dormant partner at the time of the contract and was not discovered till after judgment: Smith v. Black, 9 S. & R. 142; Anderson v. Levan, 1 W. & S. 334; United States v. Ames, 99 U. S. 35.

The rule that what has been judicially determined shall not again be made the subject of controversy, extends to every question in the proceedings which was legally cognizable, and applies where a party has neglected the opportunity of trial, or has failed to present his cause or defense in whole or in part under the mistaken belief that the matter would remain open and could be made the subject of another proceeding. . . . In order to render a judgment effectual as a bar it must appear that the cause of action is the same in substance and can be sustained by the same evidence: Schwan v. Kelly, 173 Pa. 65; Hartman v. Incline Plane Co., 2 Pa. Superior Ct. 123; Hartman v. Incline Plane Co., 11 Pa. Superior Ct. 438; Corry v. Corry Chair Co., 18 Pa. Superior Ct. 271.

There can be but one final judgment in any personal action, whether founded in contract or in tort: O'Neal v. O'Neal, 4 W. & S. 130; Noble v. Laley, 50 Pa. 281; Russell v. Archer, 76 Pa. 473; Com. v. McCleary, 92 Pa. 188; Murtland v. Floyd, 153 Pa. 99.

Where a recovery has been had in a suit, in which the plaintiff counted for an entire sum, the record of such recovery is

a conclusive bar to another suit brought on the same contract, to recover a sum which was included in the declaration in the first suit: Hess v. Heeble, 6 S. & R. 57; Ingraham v. Hall, 11 S & R. 78; Kilheffer v. Herr, 17 S. & R. 319; Carvill v. Carrigues, 5 Pa. 152; Logan v. Caffrey, 30 Pa. 196; Alcott v. Hugus, 105 Pa. 350; Buck v. Wilson, 113 Pa. 423.

A verdict and judgment between the same parties or their privies, on the same subject-matter, though in a different form of action, is admissible and conclusive: Marsh v. Pier, 4 Rawle, 273; Kean v. McKinsey, 2 Pa. 30.

Opinion by Mr. Justice Brown, May 18, 1903:

In 1893, Hiram Frisbie and Horace Kipp, trading as Hiram Frisbie & Company, brought suit against James McFarlane & Company in the court of common pleas of Bradford county to December term, 1893, No. 331, to recover damages for an alleged breach of a lumber contract. When the case came to trial there was a verdict rendered on April 17, 1901, in favor of the defendants, under their plea of set-off, for $10,644.76. While that suit was pending, the appellants, on June 7, 1899. in the same court brought suit against H. E. Kipp (who was the Horace Kipp in the other suit), G. W. Kipp and E. F. Kizer, trading as Hiram Frisbie & Company and G. W. Kipp & Company. This second suit was for precisely the same claim for which the plaintiffs, as defendants in the former suit, under their plea of set-off, recovered a judgment against Hiram Frisbie and Horace Kipp, trading as Hiram Frisbie & Company. The verdict of the jury in the second suit was for $11,421.82.

Instead of pleading in abatement in the first suit that G. W. Kipp and E. F. Kizer, now alleged to be copartners of Frisbie and H. E. Kipp, had not been named as plaintiffs, the defendants went to trial, electing to stand on their plea of set-off to recover a judgment against the plaintiffs on the record. It is true that, in an anomalous way, they did try, after the verdict and certificate had been returned in their favor, to insert the names of G. W. Kipp and E. F. Kizer as plaintiffs, and succeeded in doing so; but the whole proceeding was so grossly irregular that we reversed the judgment entered against G. W. Kipp and Kizer and ordered their names to be stricken from the record: Frisbie v. McFarlane, 196 Pa. 116.

In the present case the question reserved by the court was, whether the plaintiffs can now recover on their claim, which is the identical one used by them in their recovery against one of the present defendants, plaintiff in the suit to December term, 1893, No. 331. Having been of opinion that the plaintiffs could not use their claim a second time for the purpose of obtaining a second judgment against the firm of Hiram Frisbie & Company and Horace E. Kipp, the judgment was directed to be entered for the defendants non obstante veredicto, and the only question for our consideration is the correctness of the judgment so entered.

McFarlane & Company had but one cause of action against the firm of Hiram Frisbie & Company, whoever may have composed it. Instead of enforcing it in the present suit, they saw fit to do so, under their plea of set-off, in the former one, in which H. E. Kipp, as a member of the firm, was one of the plaintiffs. By that plea, when they insisted upon a certificate in their favor, which they received from the jury, they became the actors, and, having recovered once against Horace E. Kipp, upon the joint contract of the copartnership, neither he nor any of the others jointly bound with him, but who may not have been joined with him as a plaintiff, can be subjected to a suit by the defendants against him and them for identically the same thing that was the subject of their set-off. This present suit is against him as well as them, and, being for the joint liability, judgment cannot be only against them. It must be against all of them, or in favor of all of them. But, if against all of them, there will be two judgments against Kipp on the same claim. The Acts of April 6, 1830, P. L. 277, and April 11, 1848, P. L. 536, providing when copartners not served or included in one suit can be sued in another, have no application to a case like this, and the question before us will be disposed of without regard to them, according to the common-law rule upon the subject.

By their election to recover under their plea of set-off in the first suit, the appellants were as effectually bound as if they had recovered on the same cause of action in another suit in which they were the plaintiffs. Even if they had not known when they put in their plea who composed the firm, their subsequent discovery of who the real members were could not give

them a new cause of action. The breach of the contract was their cause of action, and the discovery of other partners could not give them a new substantive cause of action: Smith v. Black, 9 S. & R. 142. In that case, in which it was decided that a judgment recovered against one partner is a bar to a subsequent suit against both, though the new defendant was a dormant partner at the time of the contract, and was not discovered until after the judgment, DUNCAN, J., said: "No principle is better settled, than that a judgment once rendered absorbs and merges the whole cause of action, and that neither the matter, nor the parties, can be severed, unless, indeed, where the cause of action is joint and several, which certainly actions against partners are not: transit in rem judicatam. . . . . I am of opinion, that the law will not suffer this splitting up either of actions or severing of persons, and that where the cause of action is a joint one, a judgment once rendered extinguishes the original cause of action, and is a bar, not only to a subsequent action brought against the same persons, but against all others; that the judgment puts an end to all litigation on the subject-matter of the action, and that a discovery of a new party, or the happening of new damages does not give a new cause of action." "It must be considered settled, that if the known partner is sued, and judgment and execution against him, without satisfaction, a dormant partner, afterwards discovered, cannot be made liable:" Anderson v. Levan, 1 W. & S. 334.

The doctrine in England and in this country as to the effect of a suit and judgment against one of two or more partners or joint contractors is announced in Mason v. Eldred, 73 U. S. 231: "The general doctrine maintained in England and the United States may be briefly stated. A judgment against one upon a joint contract of several persons, bars an action against the others, though the latter were dormant partners of the defendants in the original action, and this fact was unknown to the plaintiff when that action was commenced. When the contract is joint, and not joint and several, the entire cause of action is merged in the judgment. The joint liability of the parties not sued with those against whom the judgment is recovered, being extinguished, their entire liability is gone. They cannot be sued separately, for they have incurred no sev-

eral obligation; they cannot be sued jointly with the others, because judgment has been already recovered against the latter, who would otherwise be subjected to two suits for the same cause." In support of this doctrine, among many other authorities to which attention could be called, reference is made to the following: King v. Hoare, 13 Meeson & Welsby, 494; Sessions v. Johnson, 95 U. S. 347; United States v. Ames, 99 U. S. 35; Ward v. Johnson et al., 13 Mass. 148; Robertson v. Smith, 18 Johnson, 459; Wann v. McNulty, 7 Ill. 355.

The appellants having recovered once against Horace E. Kipp cannot do so again for identically the same claim in this suit against him and others, now alleged to be his copartners, and the judgment in favor of the defendants non obstante veredicto, is affirmed.

Willey, Appellant, *v.* Browne.

Promissory notes—Notes held as collateral—Actions.

Where a creditor takes from a bankrupt composition notes under an agreement that if any note should be in default, all shall become due, and subsequently the creditor assigns his claim to a third person and takes in payment thereof the notes of the third person, and retains the composition notes as security for payment of the other notes, the creditor cannot proceed on the composition notes until after a default upon the other notes, and this is the case although there may have been a default on the composition notes.

Argued March 24, 1903. Appeal, No. 25, Jan. T., 1903, by plaintiff, from order of C. P. No. 5, Phila. Co., Sept. T., 1902, No. 2363, discharging rule for judgment for want of a sufficient affidavit of defense in case of Francis Willey, trading as Francis Willey & Company, v. William Browne. Before Mitchell, Fell, Brown, Mestrezat and Potter, JJ. Affirmed.

Assumpsit on promissory notes.

From the record it appeared that suit was brought on four promissory notes dated November 9, 1901, payable at different times, given by defendant as composition notes in a proceeding

in bankruptcy. The notes were given under an agreement that if default should be made upon any one all the others should become due.

Defendant filed an affidavit of defense as follows:

The promissory notes upon which suit is brought were executed in pursuance of a composition in bankruptcy offered by the firms of William Browne & Sons and the Phœnix Mills Company, of which the defendant was a member. The said Francis Willey & Company, who were creditors of said bankrupts, opposed the said composition and upon its confirmation by the United States district court for the eastern district of Pennsylvania, appealed to the circuit court of appeals. The said Francis Willey & Company were represented in said proceedings in bankruptcy and in the appeal taken from the said confirmation by Messrs. Greenwald & Mayer, their counsel in the present proceedings.

After the taking of the said appeal a settlement was had with the said plaintiff, through his attorneys, Messrs. Greenwald & Mayer, who were duly authorized to act in the premises, whereby in consideration of the payment by one Charles F. Clarke of the sum of $8,500 in cash and the execution and delivery of five promissory notes executed by the said Charles F. Clarke and indorsed by the Schuylkill Worsted Mills Company, the said appeal was discoutinued and the plaintiff assigned to the said Clarke all claims and demands which he had or might have against the estate of William Browne & Sons or the Phœnix Mills Company or any of the partners composing said firms, including the said promissory notes now in suit. It was further agreed that the said Greenwald & Mayer should retain all the composition notes given to the appellants in said proceedings, in order to secure the payment of the said notes given by said Clarke, but by a supplemental agreement it was expressly stipulated that the notes now in suit should be held only to secure the payment to said Greenwald & Mayer of the sum of $1,750, and that all other moneys received thereon should be the property of the said Charles F. Clarke.

The said settlement and supplemental agreement are evidenced by two writings, copies of which are hereto annexed and made part hereof.

Deponent avers that the said Charles F. Clarke by assign-

ment dated April 1, 1902, a copy of which is hereto annexed and made part hereof, assigned and transferred to this deponent all his, the said Clarke's interest, right and title in the said promissory notes upon which this suit is brought.

Deponent has been notified by Messrs. Greenwald and Mayer and believes and therefore avers that the said sum of $1,750, to secure the payment of which the said notes were held by them, is payable to them in their own right and for their own use, and that the said Francis Willey & Company have no interest therein and have no title to or interest in the said notes for which this suit is brought.

Deponent further avers that in addition to the sum of $1,415.44 which the said Greenwald & Mayer have already received by way of dividend on said notes out of the proceeds of certain property conveyed in trust to secure their payment, as set forth in the statement of claim, the said Greenwald & Mayer have received or are now entitled to receive a further dividend which will be sufficient to make up the sum of $1,750, for which said notes are held.

The agreements and assignments referred to in the affidavit of defense were as follows:

"COPY OF AGREEMENT.

"This agreement entered into this Twenty-eighth day of September, A. D., 1901, between Charles F. Clarke of the one part, and Francis Willey & Company, Hecht Liebeman & Company, Bach Becher & Company, Mawson Brothers, and Brown & Adams, of the other part (said Francis Willey & Co., Hecht Liebeman & Co., Bach Becher & Co., Mawson Bros. and Brown & Adams, being Appellants in a certain appeal now pending and undetermined in the Circuit Court of Appeals for the Third Circuit, No. 16, September Term, 1901), Witnesseth:

"First. In consideration of the payment to Messrs. Greenwald & Mayer, attorneys for the said Appellants, of the sum of Eight thousand five hundred dollars, and of the execution and delivery of the notes hereinafter mentioned, the said Appeal shall be discontinued of record without costs to either party.

"Second. The notes hereinbefore mentioned are drawn by the

said Charles F. Clarke to the order of the Schuylkill Worsted Mills Company and indorsed by the said Company, in pursuance of a resolution of the directors thereof, duly passed and bear date September 26th, 1901. Said notes are for the following amounts and terms:

"One for $3,217.51 payable three months after date.

"One for $3,217.51 payable six months after date.

"One for $1,066.44 payable four months after date.

"One for $1,079.44 payable four months after date.

"One for $2,748.00 payable three months after date.

"Third. The said parties of the second part in consideration of the premises hereby assign unto the said Clarke all claims and demands which they, or any of them have, or may have, against the bankrupt estate of William Browne & Sons and The Phœnix Mills Company, or against any of the partners composing said William Browne & Sons and The Phœnix Mills Company.

"Fourth. As collateral security for the payment of the notes above mentioned, Messrs. Greenwald & Mayer shall be entitled to receive and retain the several composition notes offered by William Browne to the said parties of the second part, and upon the payment of all the notes mentioned in the second clause, all of the said composition notes shall be delivered to said Clarke.

"Fifth. If default shall be made in the payment of any of the notes executed by Clarke, the said composition notes shall be retained until the parties of the second part shall have received thirty-three and one-third per cent. of their respective claims except Francis Willey & Co., who are entitled to receive two thousand dollars ($2,000) cash over and above the said thirty-three and one-third per cent.

"Sixth. As further collateral security for the payment of said notes, the said Clarke agrees upon the issue of certain bonds of the Schuylkill Worsted Mills Company, to which he is entitled for services rendered to deliver to said Greenwald & Mayer, as trustees for the parties, bonds covering twenty-five per cent. of the claims of the parties mentioned as Appellants in the suit now pending, which bonds shall be returned to said Clarke upon the payment of the notes given by him."

"COPY OF SUPPLEMENTAL AGREEMENT.

"Whereas a certain agreement was entered into on the 28th day of September, 1901, wherein Charles F. Clarke, Francis Willey & Co., Hecht, Liebeman & Co., Bach Becher & Co., Mawson Bros., and Brown & Adams are parties; and it is therein agreed by Paragraph Four (4) in said agreement, as follows: 'As collateral security for the payment of the notes above mentioned, Messrs. Greenwald & Mayer shall be entitled to receive and retain the several composition notes offered by William Browne to the said parties of the second part, and upon the payment of all the notes mentioned in the second clause, all of the said composition notes shall be delivered to said Clarke.'

"It is further agreed, that of the composition notes given by the said William Browne, there shall be retained by Greenwald & Mayer from the proceeds of such composition notes to which Francis Willey & Co. are entitled, the sum of Seventeen hundred and fifty dollars ($1,750), and when such sum is paid any other moneys realized upon said notes shall be paid to said Clarke.

"When the notes given by said Clarke to the order of the Schuylkill Worsted Mills Company shall have been entirely paid, all other composition notes given by William Browne shall be surrendered unto said Clarke."

"COPY OF ASSIGNMENT.

"For value received I hereby assign and transfer unto William Browne all my right, title and interest in four certain promissory notes drawn by the said William Browne to the order of Francis Willey & Company, dated November 9, 1901, one of them for $2,058.81, payable four months after date; another of them for $2,573.51, payable eight months after date; one of them for $2,573.51, payable twelve months after date; one of them for $1,372.53, payable sixteen months after date; which said notes have been assigned and transferred to me by the said Francis Willey & Company, under an agreement entered into with them dated September 28, 1901, and are now held to secure the payment to Messrs. Greenwald & Mayer of the sum of $1,750, as provided in a certain supplemental agreement entered into on October 1, 1901.

"Witness my hand and seal this first day of April, A. D., 1902.

"CHARLES F. CLARKE." (Seal)

The court discharged the rule for judgment for want of a sufficient affidavit of defense.

Error assigned was the order of the court.

Clinton O. Mayer, of *Greenwald & Mayer*, for appellant.

Edward P. Bliss, for appellee.

OPINION BY MR. JUSTICE MITCHELL, May 25, 1903:

The notes in suit were given by defendant to plaintiff as composition notes in a proceeding in bankruptcy, and the affidavits of defense aver that the notes were assigned by plaintiff to one Clarke, and by Clarke to defendant, with a saving of the right of Greenwald & Mayer to hold them as collateral security for the sum of $1,750 due to them individually. The affidavits further aver that Greenwald & Mayer have already received from dividends in the bankruptcy proceeding, paid or now payable, full satisfaction of their claim. If the facts be so as we must assume on the rule for judgment, there is nothing due to plaintiff for which judgment can now be entered.

Whether plaintiff can recover on a trial will involve other considerations. The agreement between plaintiff and Clarke provides for the giving of certain notes by Clarke, in part payment for the assignment to him of the notes in suit, but also provides that the notes in suit shall be held by Greenwald & Mayer, attorneys for plaintiff, as collateral security for Clarke's notes, to be delivered to Clarke on payment of all his own notes. By the supplemental agreement between the same parties two days later, it was further agreed that out of the proceeds of the composition notes (in suit) to which plaintiff would be entitled, there should be retained by Greenwald & Mayer $1,750, and "when such sum is paid any other moneys realized upon said notes shall be paid to said Clarke." This is the real point of controversy in the present case. The defendant claims that this provision is a substitute for the clause as to the collateral in the original agreement, and under it the right to hold the

notes in suit is only to secure the money due Greenwald & Mayer, which defendant claims has already been paid. Plaintiff on the other hand claims that the only effect of the supplemental agreement is to entitle Greenwald & Mayer to the first payment out of the moneys realized on the composition notes, without disturbing the right to hold the rest of the notes as security for the payment of Clarke's notes. On the face of the writings the latter would seem to be the correct construction. Plaintiff under the composition received the notes of defendant. These he sold to Clarke, taking in payment, inter alia, Clarke's notes, but under the agreement continuing to hold defendant's notes as collateral security for Clarke's, with a stipulation that if default should be made on any of Clarke's notes, "the composition notes shall be retained until the parties of the second part" (among whom was the plaintiff) shall have received a stipulated percentage of their claims. By the supplemental agreement, a preference in payment was given to the claim of Greenwald & Mayer, and when that was paid the subsequent moneys were to go to Clarke. Under the original agreement Clarke's right to receive the money on the composition notes as it was paid might have been open to question, but under the supplemental agreement it was made clear. But at the same time there is no evidence of intent on the part of plaintiff to release his hold on the composition notes as security for the payment of Clarke's and the provision for default on the latter, already quoted, is clear to the contrary. The effect of the two instruments together, is that Greenwald & Mayer, as attorneys for plaintiff, were to hold defendant's notes as security for Clarke's, and out of the first moneys received (whether as proceeds of these notes, or of Clarke's, or in some other manner from the bankrupt estate is not clear) were to pay their own claim of $1,750, then to pay over proceeds to Clarke, so long as he was not in default on any of his own notes; if he became in default then to pay plaintiff and the other parties of the second part up to the stipulated percentage; and finally, when Clarke's notes were all paid, to deliver up to him the collateral. While the meaning is not free from obscurity, this construction seems to be indicated on the face of the papers, though at the trial it may be changed by evidence of a different one by the parties at the time or subsequently.

Plaintiff however was not entitled to judgment. The notes sued on were not his property but Clarke's, and his title to them was only to hold as collateral security for the payment of Clarke's notes. The latter under the agreement were the principal debt and so long as there was no default on that there was no right of plaintiff to proceed on the collateral. The composition between defendant and his creditors provided that if default was made on any of the composition notes, all of them should become due, and plaintiff declared on this basis. But that was not sufficient. Clarke might have done so as the owner of the notes but plaintiff lost his right to do so when he parted with his ownership and agreed to take Clarke's notes as the principal debt. Thereafter he could not proceed on the defendant's notes until a default occurred on Clarke's, and while it is said in argument that there was such default, yet it is not averred in the statement nor does it appear anywhere of record, and under the agreements set forth in the affidavits of defense, it was a condition precedent to plaintiff's right of action against defendant.

Judgment affirmed.

Behl, *v.* Philadelphia, Appellant.

Negligence—City—Defect in highway—Province of court and jury.

In an action by a widow against a city to recover damages for the death of her husband, the evidence for the plaintiff tended to show that the deceased was thrown from his wagon by a jolt, or by the wheel of the wagon slipping into a hole or rut beside a railway track. The evidence for the defendant tended to show that the wheel had caught in the frog of the railroad track and given the wagon a sudden twist. *Held*, that the case was for the jury.

Argued March 24, 1903. Appeal, No. 358, Jan. T., 1902, by defendant, from judgment of C. P. No. 1, Phila. Co., March T., 1902, No. 2450, on verdict for plaintiff in case of Annie Behl v. Philadelphia. Before MITCHELL, FELL, BROWN, MESTREZAT and POTTER, JJ. Affirmed.

Trespass to recover damages for death of plaintiff's husband.

Verdict and judgment for plaintiff for $5,000. Defendant appealed.

Error assigned was in submitting the case to the jury.

Chester N. Farr, Jr., assistant city solicitor, with him *Samuel Chew* assistant city solicitor, and *John L. Kinsey*, city solicitor for appellant.

John M. Vanderslice, with him *Clarence Vanderslice*, for appellee.

PER CURIAM, May 25, 1903:

The jolt of the wagon by which plaintiff's husband was thrown off might have occurred either from the wheel slipping into the hole or rut beside the railway track, as testified to on the part of the plaintiff, or by its having caught in the frog of the railway track and given the wagon a sudden twist, as claimed by the defendant. There was positive testimony both ways from witnesses who were present at the time. The case was therefore clearly for the jury notwithstanding the fact that the witnesses for the defense were the most numerous.

Judgment affirmed.

Kase, Appellant, *v.* Burnham.

Appeals—Assignments of error—Findings of fact and law.

An assignment of error which includes the rulings of the judge below on a large number of different requests for findings of fact and law is in total violation of the rules of court, and will not be considered.

Corporations—Bonds—Ownership of bonds—Evidence—Equity.

A bill in equity to recover the bonds of a corporation cannot be sustained where the plaintiff fails to show ownership of the bonds in himself, and merely shows that the bonds were issued to him as an officer of the corporation to be used in making purchases or raising funds for it.

A bill in equity filed by a person as owner of collateral to recover the collateral on the ground that the debt secured by it had been paid in full cannot be sustained, where it appears that the suit was not brought until

twenty-six years from the time the right of action accrued, and that the delay was due to plaintiff's difficulty in establishing his title to the collateral as against another party. In such a case equity follows the law as to barring the action.

Argued March 24, 1903. Appeal, No. 234, Jan. T., 1902, by plaintiff, from decree of C. P. No. 1, Phila. Co., June T., 1899, No. 657, dismissing bill in equity in case of J. Hervey Kase et al., Executors of Simon P. Kase, Deceased, v. George Burnham et al., Surviving Partners of M. Baird & Company. Before MITCHELL, FELL, BROWN, MESTREZAT and POTTER, JJ. Affirmed.

Bill in equity to recover bonds of a corporation.
The court dismissed the bill.

Errors assigned were (1–3) in overruling the plaintiffs' request for findings of fact and law, and affirming defendants' request for findings of fact and law, quoting the requests in full; (2) in excluding the record of a suit between plaintiff and a corporation as evidence of ownership of the bonds.

Carrie B. Kilgore and *James Scarlet*, for appellants.

James Wilson Bayard and *John G. Johnson*, for appellees.

PER CURIAM, May 25, 1903:

The first and third assignments of error are in total violation of the rules of court, as each of them includes the rulings of the judge below on a large number of different requests for findings of fact and law. The second assignment is to the rejection of the record of the suit between Kase and the Danville, Hazleton & Wilkes-Barre Railroad Company, as an evidence of the title of Kase to the bonds now in controversy. This record was so plainly res inter alios acta that its exclusion does not require discussion, and we might well dismiss the appeal without further notice.

But to put an end to this protracted and useless litigation it may be well to add a few words on the general merits.

This is a bill filed in 1899 to recover certain bonds pledged by plaintiff in 1870 as security for promissory notes due to the

predecessors of defendants for locomotives furnished to the Danville, Hazleton & Wilkes-Barre Railroad Company. The first step of course was for the plaintiff to prove his ownership of the bonds, and this there was an utter failure to do. So far as can be ascertained from this very defective and disorderly paper-book, the bonds were issued to Kase as an officer of the railroad company, to be used in making purchases or raising funds for it, and in this particular instance, they were pledged as security for a debt of the company. Prima facie, therefore, they were the bonds of the company and not of the plaintiff.

The transactions, however, between Kase and the railroad company were complicated, and led to a protracted litigation finally resulting in 1898 in a decree which, however, was res inter alios acta as to the present case, and there was no other evidence of plaintiff's title.

But plaintiff's case was equally defective in another respect. He sued as owner of collateral, to recover it on the ground that the debt secured by it had been paid in full. If the facts were so he had a good cause of action at law. If he had brought suit at law he would have been barred by the statute of limitations, and the lapse of twenty-six years was equally fatal in equity unless clearly excused. The excuse offered was the litigation over the title with the railroad company. This excuse was inoperative in any respect as against defendants. It amounted to no more than that during the long interval plaintiff's title was doubtful or difficult to prove. This was no fault of defendants, and no reason why they should be called upon to answer, after such lapse of time with its changes in the partnership, death of parties and witnesses and loss of documentary evidence. As already said they took the bonds, prima facie belonging to the railroad company, as security for a debt admittedly owing by the company. When they sold the notes to the Pennsylvania Railroad Company as lessee of the debtor company and transferred the collateral to the purchaser, there was nothing to give them notice that the transaction was not in every way regular and legal. Being without fault in that respect there was nothing to prevent the operation of the statute of limitations in their favor, and in such cases equity follows the law.

Decree affirmed with costs.

Philadelphia to use v. Neill, Appellant.

Municipalities—Subcontractors' bonds—Waiver—Evidence.

A corporation plaintiff will not be deemed to have waived the benefit of ordinance of the city of Philadelphia of March 30, 1896, providing for bonds by contractors for the protection of subcontractors, by evidence which at the most amounts only to the expression of an opinion by an officer of the company that they did not think themselves within the bond as they had sold the material on the credit of the contractor.

Not decided whether the protection of the bond may be waived without the city's consent.

In an action by a material man on a bond given under the ordinance of March 30, 1896, the claim of the plaintiff is brought within the terms of the bond by proof of the sale and delivery of bricks to the contractor, and the latter's use of them in paving under his contract with the city. The fact that the contractor, desiring to make his bid to the city for the work intelligently, agreed with the plaintiff on the price of the bricks some time before his contract with the city was actually made, does not vary the case, if the sale itself is not made until after the contract.

Argued March 25, 1903. Appeal, No. 348, Jan. T., 1902, by defendant, from judgment of C. P. No. 3, Phila. Co., Sept. T., 1900, No. 293, on verdict for plaintiff, in case of Philadelphia to use of McAvoy Vitrified Brick Company v. Aaron M. Neill and Lincoln Savings & Trust Company. Before Mitchell, Fell, Brown, Mestrezat and Potter, JJ. Affirmed.

Assumpsit on a bond given under ordinance of the city of Philadelphia of March 30, 1896. Before Finletter, P. J.

At the trial it appeared that McAvoy Vitrified Brick Company furnished to Aaron M. Neill bricks which the latter used in paving Wakeling street, under a contract which he had with the city. The surety defended on the ground that the use plaintiff had waived the benefit of the ordinance, and had furnished the bricks on the individual credit of Neill. The testimony as to the alleged waiver is stated in the opinion of the Supreme Court.

Verdict and judgment for plaintiff for $1,814.35. Defendant appealed.

Errors assigned were various rulings on evidence, and the charge.

M. J. O'Callaghan, for appellants.

Edward A. Anderson, for appellees.

—

Per Curiam, May 25, 1903:

This action is upon a bond given by the defendants to the city of Philadelphia, under the ordinance of March 30, 1896, for the protection of subcontractors and persons furnishing materials to contractors for city work. The question involved is not as appellant states it, whether the use plaintiffs as material men could waive the benefit of the ordinance and sell on the sole personal credit of the contractor, but whether they did so in this case. Whether they could do so may be open to question, as the bond is exacted by the city as one of the terms of the contract, for the protection of the city's own interests (Phila. v. Stewart, 195 Pa. 309), and the right of any other party to waive this protection without the city's consent is far from clear. But it will be time enough to determine that question when it arises. In the present case the proof of such waiver wholly failed. The evidence at most amounted only to the expression of an opinion by an officer of the use plaintiff that they did not think themselves within the bond as they had sold the bricks on the credit of the contractor.

The case was tried by the defendant and has been argued here as if it was a claim under the mechanic's lien law, and his points for charge being framed on the same view the learned judge committed no error in disregarding them. The use plaintiff proved the sale and furnishing of the bricks to the contractor, and the latter's use of them in paving under his contract with the city. This brought the claim within the terms of the bond. The fact that the contractor, desiring to make his bid to the city for the work intelligently, agreed with the plaintiff on the price of the bricks some time before his contract with the city was actually made, did not vary the case at all. Though the price was agreed upon in advance, the sale was not made until after the contract.

Judgment affirmed.

Fitzpatrick, Appellant, *v.* Union Traction Company.

Negligence—Contributory negligence—Charge of court—Harmless error.

In an accident case it is improper for the court to instruct the jury that the plaintiff cannot recover unless he proved that he was in nowise guilty of any negligence that contributed to the injury. Such an instruction imposes upon the plaintiff the burden of showing affirmatively that he was not guilty of contributory negligence. This is more than he was required to do. It is sufficient that his own evidence does not disclose any contributory negligence. A judgment, however, will not be reversed for such error where it appears that the court subsequently gave full, ample and proper instructions, so that the jury could not have been misled.

The general effect of the charge of the court, rather than a casual expression of it must govern the interpretation or construction of it.

It is improper to assign as error the entire charge of the court without pointing out specific errors.

While the trial judge may not decide a disputed question of fact when the averments of the parties in its support or denial are sustained by reasonable proof, he may express his opinion respecting the evidence, and at times it is his duty to do so.

Appeals—Assignments of error—Evidence.

A judgment will not be reversed because of the exclusion of certain testimony where the party is subsequently permitted to testify to substantially the same allegations as those contained in the rejected offers.

Argued Jan. 26, 1903. Appeal, No. 224, Jan. T., 1902, by plaintiff, from judgment of C. P. No. 2, Phila. Co., June T., 1898, No. 296, on verdict for defendant in case of Thomas H. Fitzpatrick v. Union Traction Company. Before MITCHELL, DEAN, BROWN, MESTREZAT and POTTER, JJ. Affirmed.

Trespass to recover damages for personal injuries. Before SULZBERGER, J.

At the trial it appeared that plaintiff was injured on December 14, 1897, by a collision with a wagon which he was driving and a car of the defendant company.

Verdict and judgment for defendant. Plaintiff appealed.

Errors assigned were (1) extracts from the charge quoted in the opinion of the Supreme Court; (2) the charge as a whole, quoting it; (3-6) exclusion of certain offers of evidence, quoting the bill of exceptions.

G. W. Pepper, with him *W. B. Bodine, Jr.*, for appellant.

Thomas Leaming, with him *Thad. L. Vanderslice*, for appellee.

Opinion by Mr. Justice Potter, May 25, 1903:

The first assignment of error is based upon the following extract from the charge of the learned trial judge, "In order that he (the plaintiff) should be entitled to damages he must prove two things to you, first, that he was in no wise guilty of any negligence that contributed to the injury." Taken by itself this was clearly an erroneous statement of the law, for it would impose upon the plaintiff the burden of showing affirmatively that he was not guilty of contributory negligence. This is more than he is required to do. It is sufficient that his own evidence does not disclose any contributory negligence. The court below evidently made the statement complained of, inadvertently, as his intention, as gathered from other portions of the charge, was merely to instruct the jury that before a recovery could be had by the plaintiff, they must find two things, first, that he was not guilty of contributory negligence, and secondly, that the defendant was negligent. The court gave substantially that instruction to the jury at the conclusion of the charge, in the following language: "The facts are for you. The value of the testimony is for you. If the plaintiff, without any fault of his own, was injured by the fault of the defendant's motorman, then he can recover, and if he can recover, he can recover according to the measure of the damages I have given you. If, however, he in the smallest degree contributed himself to the injury, he cannot recover. Moreover, he cannot recover if, however innocent the plaintiff was, the motorman did nothing wrong. If the motorman did his duty simply, and, in consequence of some other set of circumstances, not known to us, the accident happened, then the plaintiff cannot recover. It requires negligence in the defendant and freedom from negligence in the plaintiff, both to enable the plaintiff to recover." We think these instructions fully corrected the inaccuracy of the expression used in the former part of the charge and gave to the jury a plain and accurate statement of the law.

The general effect of the charge of the court, rather than a casual expression in it, must govern the interpretation or construction of it: Kyle v. Southern Elec. Light & Power Co., 174 Pa. 570; McCloskey v. Bell Gap R. R. Co., 156 Pa. 254. The first assignment of error is therefore not sustained.

The second specification is practically, as was the case in Drenning v. Wesley, 189 Pa. 160, "to the entire charge of the court. No specific error is pointed out to us by the assignment and therefore no discussion of it is called for." We have however carefully examined the charge in the light of this assignment. The appellant admits that the charge, with the exception of the portion covered by the first assignment, does not contain any misstatement of law. But it is contended that "it amounted to an argument in favor of the defendant and is replete with comments on the testimony which are unwarranted and which prejudiced the plaintiff's case before the jury."

Our reading of the charge does not so impress us; we find no misstatements of the evidence, and no unwarrantable conclusions. As this court said in Newhard v. Yundt, 132 Pa. 324, in answer to a somewhat similar criticism of a charge: "nor were there any such expressions of opinion upon the facts as would amount to error, under the authority of Ditmars v. Com., 47 Pa. 335, where it was held that it is often proper for the court to express an opinion upon the facts, provided care is taken not to infringe the province of the jury. In referring to the testimony and to the names of the witnesses by whom it is given, much latitude must necessarily be allowed in a charge, and where there is nothing in it that is unfair or misleading or that withdraws the facts from the jury, we cannot reverse. We are not prepared to say that either of these defects appears in this charge. If it can be said to lean somewhat toward the plaintiffs it may be due to the strength of their case."

In Fredericks v. Northern Central R. R. Co., 157 Pa. 103, Mr. Justice GREEN said, on page 128: "The complaint that the judge expressed an opinion on the facts . . . . is without merit. In the case of Leibig v. Steiner, 94 Pa. 466, we said, A judge may give his opinion freely on the weight and value of evidence for he is the best and safest adviser of the

jury; but he has no authority to decide any question of fact, when the party affirming it has sustained his averment by any reasonable proof. Very strong expressions of opinion on the facts are tolerated, indeed sometimes may be necessary. . . . Exceptional cases arise where it is the duty of the judge to express his opinion of the facts and guide the mind of the jury to a correct view of the evidence; and, therefore, it has been settled that when he does so without misleading or controlling them in the disposition of the facts, there is no ground for reversing."

In Price v. Hamscher, 174 Pa. 73, our Brother FELL says on page 78: "While a judge may not decide a disputed question of fact when the averments of the parties in its support or denial are sustained by reasonable proof, he may express his opinion respecting the evidence, and at times it is his duty to do so."

It may be admitted that in the present case there was a rather strong intimation of the opinion of the court upon certain facts, but as the case was left fully and clearly to the jury, we see nothing which calls for reversal in this respect.

In the remaining assignments of error the appellant complains of the exclusion of certain offers of testimony. Even if this were shown to be error, it would be harmless. For the plaintiff was permitted to testify to substantially the same allegations as those contained in the rejected offers, and the testimony was thus before the jury for whatever it was worth.

The assignments of error are all overruled and the judgment is affirmed.

Montooth Borough, Appellant, v. Brownsville Avenue Street Railway Company.

Street railways—Boroughs—Contract—Performance—Impossibility of performance.

A street railway company which has entered into a contract with a borough to build a railway on a street, is not relieved from its contract by reason of the fact that for a distance of 750 feet, the company was confined to the use of about eleven feet only in width of the highway;

and this is especially the case where the evidence is not conclusive that the railway could not have been constructed and operated on the street.

Contract—Performance—Impossibility of performance.

Impossibility of performance of a contract is in general no answer to an action for damages for nonperformance.

Impossibility of performance, whether such impossibility arises through the fault of the promisor or not, will not constitute a valid defense to an action for a breach of a contract. If the promisor makes the promise conditional upon its continued possibility, then the risk is assumed by the promisee and he loses his right of action, if the contingency arises. But if the promisor makes the promise unconditionally, then he assumes the risk, and as a general rule he cannot set up the impossibility of performance as a defense to an action by the promisee.

Argued Feb. 4, 1903. Appeal, No. 184, Oct. T., 1902, by plaintiff, from judgment of C. P. No. 1, Allegheny Co., Dec. T., 1901, No. 316, on verdict for defendant in case of Borough of Montooth v. Brownsville Avenue Street Railway Company and the Mercantile Trust Company of Pittsburg, Before MITCHELL, DEAN, BROWN, MESTREZAT and POTTER, JJ. Reversed.

Assumpsit for breach of contract to construct a street railway. Before BROWN, J.

The facts are stated in the opinion of the Supreme Court.

The court gave binding instructions for defendant.

Verdict and judgment for defendant. Plaintiff appealed.

Error assigned was in giving binding instructions for defendant.

H. I. Riley, for appellant.

William A. Challener, with him *Homer L. Castle* and *Clarence Burleigh*, for appellees.

OPINION BY MR. JUSTICE POTTER, May 25, 1903:

This is an action to recover upon a bond given by the Brownsville Avenue Street Railway Company, to the borough of Montooth, to secure the construction of a street railway upon West street in the said borough. The consent of the borough had been given by an ordinance dated September 21, 1900, which was formally accepted by the street railway company

upon September 26 following. Its provisions required the filing of a bond conditioned for the faithful performance of all the terms of the ordinance and stipulated that the bond was to be forfeited, and the sum of $2,000 paid as liquidated damages to the borough, if the street railway was not completely built and in operation on or before the first day of October, 1901. The bond thus required was given, and upon it the present action was brought. The trial judge found that the ordinance and its acceptance created an agreement between the borough and the railway company. And that by the terms of this agreement the company received a valuable right, for which as a consideration it was to construct the line, and grade and fill in with broken stone, and pave the portions of West street referred to. He further found that the entire failure of the railway company to perform its agreement had occasioned a loss to the borough, which was not to be measured by any ordinary standard, and that the damages as agreed upon and liquidated by the parties, should be considered as the proper measure of compensation. But the learned judge was of opinion that the railway company had a good defense upon the ground of the insufficiency of the width of the highway. It appeared from the testimony that for a distance of about 750 feet the width of the portion of West street in the borough was not more than eleven and one half feet, and the court held as a matter of mathematical certainty, and therefore of law, that this was not sufficient to admit of the safe construction and operation upon it of a line of street railway. Being thus of the opinion that it was impossible for the company to perform its contract, he directed a verdict for the defendant.

But, "impossibility of performance is, in general, no answer to an action for damages for nonperformance:" 3 Addison on Contracts, * 1195.

"If one for a valid consideration promises another to do that which is in fact impossible, but the promise is not obtained by actual or constructive fraud, or is not on its face obviously impossible, there seems no reason why the promisor should not be held to pay damages for the breach of the contract; not, in fact, for not doing what cannot be done, but for undertaking and promising to do it:" 2 Parsons on Contracts, * 673.

The general rule is thus stated in a discussion upon the sub-

ject of Impossibility of Performance as a Defense, in 12 Cent. L. J. 4: "Impossibility of performance, whether such impossibility arises through the fault of the promisor or not, will not constitute a valid defense to an action for a breach of the contract. If the promisor makes the promise conditional upon its continued possibility, then the risk is assumed by the promisee and he loses his right of action, if the contingency arises. But if the promisor makes the promise unconditionally, then he assumes the risk, and as a general rule he cannot set up the impossibility of performance as a defense to an action by the promisee."

It is the duty of the party making the promise, to ascertain, at the time, whether or not performance is possible. If he neglect to inform himself it is at his peril.

But it is by no means clear that the evidence in this case justifies the conclusion that the construction and proper operation of the street railway upon West street, within the borough limits, was an impossibility.

The narrow portion in which the difficulty lay, extended for a short distance only; and it does not seem to us that the problem which it presented was one to baffle the resources of the builders of modern street railways, even if for a distance of 750 feet they were confined to the use of about eleven feet in width of the highway.

The borough engineer testifies positively that it is feasible to build and operate a line of railway over the street in question; and he bases his statement upon the fact that he had actually constructed another line of street railway, which in one place had only a ten-foot right of way. The argument against the sufficiency of the width for the purpose is based upon the supposed necessity for cutting off a portion of each side of the street for a sidewalk. But it does not follow that any such exclusive use of the street at that point will be required. As the borough authorities have granted the use of that street to the company, to build its street railway upon, it is to be presumed that other provisions, by means of widening the street or otherwise, will be made for a sidewalk if it be needed. At the present time, the street does not seem to be built upon, and is but little more than a country road, but if the public needs require it, the street can be widened, either by the borough in

the usual way, or the railway company can secure additional space by the purchase of ground from the abutting owners.

The mere matter of additional expense to the company is no sufficient excuse for failure to comply with its contract.

The argument for the appellee proceeds entirely upon the assumption that the company was not bound to make any effort to secure additional space, which might be made available, if needful to enable it to build the road upon the right of way granted by the borough. We do not regard this position as tenable. The company knew the situations and the conditions existing upon the ground, or at least it certainly might have known them when it made the agreement.

It is fair to presume that at that time the company had in view a plan which would enable it to use to good advantage the privileges granted to it by the borough over the portion of West street within its limits.

The testimony shows that West street was forty feet in width, and while at the narrow part, the portion of it within the borough was only ten or eleven feet in width, yet the remainder of the highway was in existence at that point and was open for the use of the public. Nothing appears in the evidence to show that the railway company could not have obtained the right from the proper authorities, to make such auxiliary use of the remaining portion of the highway as would permit of the safe and comfortable operation of such an instrument of public convenience as a street railway. An inspection of the testimony makes it apparent that various other expedients might have been effective. For instance, if a double line of poles were thought necessary, upon the 750 foot portion, permission might have been obtained to set them outside the line of the street, and upon either side. But even if confined to the limit of space which was clearly available it seems that other methods were open to adoption, which would have made compliance possible.

It does not appear from the evidence that double lines of poles are absolutely necessary, as instances were cited in which single lines of poles to support overhead wires are in practical use; it seems also that by means of an underground conduit, the power can be conveyed, and the system successfully operated without the use of any poles at all.

As we read the evidence, we cannot avoid the conclusion that there was sufficient in it, to justify a finding that it was possible for the railway company to have complied with its agreement to build its line in accordance with the terms of the ordinance.

The third specification of error is therefore sustained. The judgment is reversed, and a venire facias de novo is awarded.

Philadelphia and Trenton Railroad Company, Appellant, v. Neshaminy Elevated Railway Company.

Street railways—Elevated passenger railway—Eminent domain—Injunction—Equity.

A passenger railway incorporated under the Act of June 7, 1901, P. L. 523, for the purpose of constructing an elevated passenger railway on a public highway of a designated distance of one mile, may after it has received the consent of the local authorities, and has filed a bond to secure a nonconsenting landowner, build such a road, notwithstanding the existence of injunctions secured at the instance of the landowner and restraining other street railway companies from building a surface street railway on the mile designated, so as to complete a continuous line of long distance electric railway.

Appeals—Assignments of error—Equity—Exceptions.

The appellate court will not consider a question which was not included in or alluded to in any finding of fact or of law by the trial court, not made the subject of any exception, nor set forth in any specification of error.

Argued Feb. 9, 1903. Appeal, No. 179, Jan. T., 1902, by plaintiff from decree of C. P. Bucks Co., April T., 1902, No. 6, on bill in equity in case of Philadelphia & Trenton Railroad Company and the Pennsylvania Railroad Company, Lessee, v. Neshaminy Elevated Railway Company. Before MITCHELL, DEAN, BROWN, MESTREZAT and POTTER, JJ. Affirmed.

Bill in equity for an injunction. Before YERKES, P. J.

From the findings of fact of the trial court it appeared that the plaintiff was the owner in fee of the land underlying the public road set forth in its articles of association as the route

of the defendant's railroad, described as follows: "Commencing in the road leading from Bridgewater to the town of Bristol at a point about two hundred (200) feet northerly from Neshaminy Creek, and running along said road northerly the distance of about one mile and to the place of beginning, all being in the Township of Bristol and in the County of Bucks."

Under the street railway act of May 14, 1889, a charter had been granted in 1896 for the building of a street railway over a route including that as above described and at the suit of the plaintiff its construction has been perpetually enjoined. Injunctions also issued at the instance of Henry L. Gaw, Jr., and other property owners along the route. By reason of these injunctions the line of street railway was incomplete and the construction of the proposed elevated line will make it possible to form a continuous line of railway between the borough of Bristol and the city of Philadelphia.

Other facts appear by the opinion of the Supreme Court.

The court dissolved the preliminary injunction.

Error assigned was the decree of the court.

George Stuart Patterson and *Henry Lear*, for appellants.—The construction of the proposed elevated railway by the appellee is by virtue of all the circumstances in the case a fraud on the commonwealth in that it will pervert the purpose sought to be effected by the passage of the Elevated Railway Act of June 7, 1901, P. L. 523, to another and inconsistent object, viz: the remedying of a break in a continuous line of street railway on a country road in a rural neighborhood, caused by injunctions heretofore obtained by abutting property owners (who are also the complainants in these proceedings), and further, this proposed elevated railway is a part of, and in furtherance of an illegal scheme to evade such injunctions: Edgewood R. R. Co.'s App., 79 Pa. 257; Mory v. Oley Valley Ry. Co., 199 Pa. 152; Penna. R. R. Co. v. Bridgeport R. R. Co., 11 Montg. Co. Law Rep. 73; Penna. R. R. Co. v. Montgomery County Pass. Ry. Co., 167 Pa. 62; Potts v. Elevated R. R. Co., 161 Pa. 396; Gaw v. Bristol & Bridgewater R. R. Co., 196 Pa. 442.

The route of the appellee, as stated in its articles of associ-

ation, is fatally defective, and contains no warrant for the construction of an elevated railway at that point on the turnpike where the appellants are the owners of the underlying fee.

Richard C. Dale, with him *B. F. Gilkeson*, *George Quintard Horwitz* and *W. F. Sadler*, for appellee.—The appellee is not attempting to use the act of June 7, 1901, for the purpose of accomplishing something which is not contemplated by it. In other words, it is not undertaking to use an act, which gives the right of eminent domain, for its own selfish and private ends, and deny to the public the rights vouchsafed by the act. It, on the contrary, desires to carry passengers and do all things in accordance with the provisions of the act of assembly. It intends to do no more and to evade no responsibilities. It has therefore the right to build the road contemplated: Rudolph v. Penna. Schuylkill Valley R. R. Co., 166 Pa. 430; Oliver v. Thompson's Run Bridge Co., 197 Pa. 344; Aurora, etc., R. R. Co. v. Lawrenceburgh, 65 Ind. 80.

Opinion by Mr. Justice Potter, May 25, 1903:

The act of June 7, 1901, authorized the incorporation of companies "for the purpose of construction and operation of passenger railways either elevated or underground, or partly elevated and partly underground, for the transportation of passengers." The first section of the act provides that permission to erect or construct such a railway must be obtained from the local authorities of the city, borough or township in which the same is to operate. The eighth section of the act confers upon corporations created under it, the right of eminent domain. The act was a general one, authorizing the formation of companies to operate in all parts of the state whether in cities, boroughs or townships. On June 13, 1901, the articles of association of the Neshaminy Elevated Railway Company, under this act of assembly, were filed in the office of the secretary of the commonwealth, and on June 18, 1901, letters patent were granted by the governor to the said company. The articles provided that the route of the railway to be constructed was as follows: Commencing in the road leading from Bridgewater to the town of Bristol at a point about 200 feet from Neshaminy creek, and running along said road northerly, the

distance of about one mile, to the place of beginning, all being in the township of Bristol and county of Bucks. On April 10, 1901, the supervisors of Bristol township gave permission for the construction of an elevated railway by the appellee company, over the route named in the articles of association.

On February 24, 1902, the company, by leave of court, filed its bond in the sum of $20,000 with approved surety, for the use of all parties interested, as required by section eight of the act of June 7, 1901, and shortly afterwards began the construction of an elevated railway over the route designated in its articles of association. On April 10, 1902, the appellants, who are owners of certain land abutting upon the route of the proposed elevated railway and also of the fee underlying the public road over which the elevated railway was to be constructed, filed the present bill complaining that certain railway and railroad companies had been previously incorporated under the street railway act of 1889 and the general railroad act of 1868, for the purpose of constructing a street passenger railway over the same route, and that they had been enjoined by the courts from so doing; that the officers, stockholders and persons interested in the defendant company were substantially the same as those of the enjoined companies; that there was no reason or necessity for an elevated railway at the point in question; that it was the intention of the defendant to construct a railway partly on the surface and that the charter was not obtained for the purpose of constructing a bona fide elevated railway, but for the fraudulent purpose of evading the injunction of the court by a use of the power of eminent domain to complete the railway of a preceding corporation. An injunction was therefore prayed for, to restrain the construction of the proposed road. The appellee company filed an answer denying any fraudulent intention, averring the regularity of its charter and asserting its purpose of building a bona fide elevated railway. The court below granted a preliminary injunction which, after hearing, was dissolved. By agreement of the parties, the hearing on the motion to dissolve was to be treated as a final hearing of the case on bill, answer and proofs, and this appeal is to be treated as an appeal from the final decree in the cause.

The duty which devolved upon the court below was to as-

certain whether the appellee company has the power under its charter to do what it proposes to do. In discharging this duty, the trial judge found that the proposed construction is within the terms of the act of June 7, 1901, above quoted, and that "the grant is within the well defined powers of the legislature." He sets forth also that the injunctions mentioned in the bill were granted upon the ground that the companies which were defendants in those cases were not possessed of the right of eminent domain, and had therefore no power to construct their roads along the highway, except with the consent of the owners of abutting land in whom were vested the underlying fee. But in the present case, the appellee company is proceeding under its right of eminent domain, and has provided for compensation to the abutting owners. The situation is, therefore, entirely different from that which prevailed when the former injunction was granted. The appellee is a new corporation, claiming to exercise the right of eminent domain under legislation since enacted. It cannot, therefore, with any propriety be charged with attempting to evade the former decision of the court. The conclusion reached by the court below as to this point is as follows: "Neither has there been established an illegal conspiracy to use the act of 1901, to fraudulently evade said decrees. Had the allegation been sustained of a lease or ownership by the road to the others in the line of railways extending from Red Lion to Bristol with the intent and for the purpose of filling out the gap, existing in a continuous line, as the result of the injunction of the court, the act of 1901 expressly permits the same to be done."

As is suggested in the argument of counsel for appellee, it would have been entirely competent for the legislature to have conferred upon existing street railway companies the power of eminent domain, in which case the reason for the continuance of the injunction formerly granted would have ceased. The legislature did not, however, see fit to adopt this simple and obvious remedy for a condition of affairs which has grown burdensome to the people of many localities in the state. It did, however, confer the right of eminent domain upon corporations organized, as is the appellee, under the act of June 7, 1901. As that act confers upon the appellee the right to construct its road above the highway, and while endowing it with the right

of eminent domain, it also fixes its liability for damages to the abutting property owners, we are unable to see that the appellants have anything of which to complain. As was said by our Brother BROWN in Gaw v. Railroad Co., 196 Pa. 451, "The company sought to do nothing that it was not specifically authorized to do by the act which gave it life, and it is a novel doctrine that a court of equity can be appealed to for its decree to restrain the doing of that which, by the express terms of the statute, is declared to be lawful."

The second proposition in the argument of appellants is based upon an alleged defect in the statement of the appellee in its articles of association as to its route. The language criticised is perhaps not appropriate, but its use evidently came from familiarity with a similar clause commonly found in applications for charters for street railways, where by means of a double track, a circuit is made upon the line. But it does not appear that this question was raised in the court below. It does not seem to be included or alluded to in any finding of fact or of law. It was not made the subject of any exception, nor is it set forth in any specification of error. For these reasons, we give it no consideration here. The findings of fact by the learned judge of the court below fully justify, and his opinion amply vindicates, the conclusion that the appellee company possesses the right to build its railway in the manner proposed.

The decree is affirmed, and this appeal is dismissed at the cost of the appellants.

Fleschhut, Appellant, *v.* Lehigh Valley Railroad Company.

Negligence—Railroad—Crossing—"Stop, look and listen."

In an action against a railroad company to recover damages for personal injuries, the evidence for the plaintiff showed that prior to the accident he went to defendant's station, loaded two trunks upon his wagon, which had a covered seat, and started away. He drove along the highway for a distance of about 200 feet parallel with the railroad, being separated from it by a platform about eleven feet wide and three feet

high. The highway crossed the track at a point about fifty feet from the end of the platform. After driving this distance, about 200 feet in all, parallel with the railroad, plaintiff turned his horse to the left, and drove towards the track intending to cross. Just then a fast train passed, and the horse was struck either by reason of having been driven too close to the track, or because in its fright it moved close enough to be struck by the passing train. The horse was killed and the plaintiff was injured. At the station plaintiff could see down the track for nearly a mile in the direction from which the train came. Plaintiff did not look down the track as he turned towards the crossing. *Held*, that the court below committed no error in entering a nonsuit, and refusing to take it off.

Argued March 18, 1903. Appeal, No. 14, Jan. T., 1903, by plaintiff, from order of C. P. Bradford Co., Sept., T., 1901, No. 411, refusing to take off nonsuit in case of William M. Fleschhut v. Lehigh Valley Railroad Company. Before MITCHELL, DEAN, FELL, BROWN and POTTER, JJ. Affirmed.

Trespass to recover damages for personal injuries. Before FANNING, P. J.

The facts appear by the opinion of the Supreme Court.

Error assigned was refusal to take off nonsuit.

D. C. De Witt, for appellant.

Henry Streeter and *William T. Davies* of *Davies & Davies*, for appellee.

OPINION BY MR. JUSTICE POTTER, May 25, 1903:

The plaintiff was at the defendants' depot for baggage. He loaded two trunks upon his wagon which had a covered seat, and started away. He drove along the highway for a distance of about 200 feet, parallel with the railroad, being separated from it by a platform about eleven feet wide and three feet high. The highway crossed the track at a point about fifty feet from the end of the platform. After driving this distance, of about 200 feet in all, parallel with the railroad, the plaintiff turned his horse to the left and drove towards the track intending to cross. Just then a fast train passed, and the horse was struck either by reason of having been driven too close to the track, or because in its fright, it moved close

enough to be struck by the passing train. The horse was killed, and plaintiff was thrown from the wagon and injured. Beyond all question, this accident was caused by the heedless manner in which the plaintiff drove up to the crossing. When he untied his horse at the depot he could see down the track towards the east, from which direction the train came, for nearly a mile. Not seeing the train then, he got in his wagon, under the cover, and drove parallel with the track, until he came to the crossing, and up to it, without again looking to the east, and as he testifies did not see the train until just before the horse was struck.

He was in no danger from the train so long as he was driving in the highway which was parallel with and some fifteen feet away from the track.

But when he turned his horse towards the track at the crossing, he came almost instantly within the reach of the passing train, and it was the sheerest neglect of duty to make this near approach, without noting the proximity of the train, which a glance toward the east must have shown him.

The undisputed testimony in this case left the learned trial judge no alternative but to enter a judgment of compulsory nonsuit. The assignment of error is overruled, and the judgment is affirmed.

Quakertown & Eastern Railroad Company, Appellant, *v.* Guarantors' Liability Indemnity Company of Philadelphia.

Attorney at law—Counsel fees—Remedy at law.

An attorney at law has a lien, or rather a right of defalcation on money or papers of his client while they are in his hands; but in a common-law action he has no such right of lien on his client's money in the hands of third persons, or upon a fund brought into court for distribution.

Where a suit in equity is brought to recover certain bonds, but an amicable agreement is reached, by which the bonds are to be returned, the attorney for plaintiff, although having rendered valuable services to the plaintiff, has no lien upon the bonds, and if at the attorney's instance the defendant deposits certain of the bonds with the prothonotary, the court has no jurisdiction to appoint an auditor to determine the amount of the

attorney's fee, and to order that such fee when ascertained shall be paid out of the bonds deposited by leave of court. In such a case the attorney has a complete and adequate remedy at law, which he must pursue.

Argued Jan. 28, 1903. Appeal, No. 281, Jan. T., 1902, by plaintiff, from decree of C. P. No. 1, Phila. Co., March T., 1898, No. 580, dismissing exceptions to auditor's report in case of Quakertown & Eastern Railroad Company v. Guarantors' Liability Indemnity Company of Pennsylvania et al. Before MITCHELL, DEAN, BROWN, MESTREZAT and POTTER, JJ. Reversed.

Bill in equity for an account of bonds and for a discovery. Before BIDDLE, P. J.

The facts are stated in the opinion of the Supreme Court.

Errors assigned were in dismissing exceptions to auditor's report.

John G. Johnson, with him *Alfred N. Keim* and *Carroll R. Williams*, for appellant.—An attorney has a lien (or rather, right of defalcation) on money or papers of his client while they are in his hands, but in a common-law action he has no such right of lien upon a fund brought into court for distribution: Dubois's Appeal, 38 Pa. 231; Patrick v. Bingaman, 2 Pa. Superior Ct. 113.

In equity, however, a fund actually brought into court for distribution is made liable for an attorney's fees according to McKelvy's Appeal, 108 Pa. 615.

In the present case our contention is, that although the action was begun by the filing of a bill in equity, yet no fund was ever actually brought into court within the meaning of McKelvy's Appeal, supra, and that therefore it cannot be properly charged that appellant company was endeavoring to take the fund out of court by the aid of other counsel. The question here, it is submitted, is really whether Mr. Terry had a lien on the bonds in the hands of the guarantors' company, defendant. The fact that the guarantors' company chose to evade any question of liability to Mr. Terry for the amount of his fee (and it is submitted there was no liability)

by putting 18 of the 101 bonds held by them in the physical custody of the court does not alter the situation. There was no receiver here, as in McKelvy's Appeal, and in no sense of the word was there a fund brought into court through the professional services of Mr. Terry.

Again, there is, it is submitted, no good reason why Mr. Terry should not establish the amount of his claim in the constitutional manner before a jury as other litigants whose claims are disputed are required to do. The appellant railroad company has sufficient assets to satisfy a verdict for a sum of money representing the value of professional services. There is no testimony that appellant company is insolvent, or is likely to prove insolvent.

George S. Graham, for appellee.

Opinion by Mr. Justice Potter, May 25, 1903:

On or about September 1, 1897, the officers of the Quakertown & Eastern Railroad Company deposited with the Guarantors' Liability Indemnity Company 214 of its first mortgage coupon bonds, of the par value of $500 each, for the purpose of securing a proposed loan of $80,000, which sum was to be used in the construction and equipment of its railroad.

The loan was never consummated, and twenty of the bonds were returned to the appellant company, leaving 194 in the supposed custody of the Guarantors' Liability Indemnity Company or its assignees, or others of the parties' defendant, to whose use it was alleged that some of the bonds had been wrongfully appropriated. During the latter part of November, 1897, the Guarantors' Liability Indemnity Company transferred all of its business to, and was succeeded by the Guarantors' Finance Company, and on March 24, 1898, this latter concern made an assignment for the benefit of creditors.

Some time in April, 1898, Henry C. Terry, Esq., of the Philadelphia Bar, was retained as attorney for the Quakertown & Eastern Railroad Company by John Jamison, its president, for the purpose of recovering the 194 bonds from the Guarantors' Liability Indemnity Company, its assigns, or other parties to whose use some of the bonds had been converted.

Accordingly on April 9, 1898, Mr. Terry filed a bill in equity

in the court below against the Guarantors' Liability Indemnity Company, its assigns and others, praying that the defendants be ordered to surrender the said bonds to the plaintiff. Subsequently two short amendments to the bill were filed by Mr. Terry.

Appearances were entered for all of the defendants, and answers filed by all excepting the receivers of the People's Bank. The case, however, was never heard in court, as it was settled by agreement and the bonds were recovered without the necessity for a trial.

Mr. Terry, and the president of the company, Mr. Jamison, and the contractor, Mr. Baker, and his attorney, Carroll R. Williams, Esq., were all active in the negotiations having in view the return of the 194 bonds. While these negotiations were pending, Mr. Terry requested his clients to arrange for the payment of his fees. This was not done to his satisfaction and in consequence, after arrangements had been made for the return of the bonds, and the matter amicably adjusted, Mr. Terry refused to mark the case settled of record until his fees were in some way secured to him. The appellant company then took a rule on the prothonotary to show cause why the case should not be discontinued by plaintiff, the appellant company, or its then counsel. This rule was discharged.

Mr. Terry then notified the Guarantors' Finance Company not to deliver any bonds in their possession to the appellant company. The Guarantors' Finance Company, by its receivers, wishing to relieve itself of any liability, to either the appellant company or Mr. Terry, filed a petition asking leave to deposit with the prothonotary of the court eighteen bonds of the appellant company, and praying the court to order it and Mr. Terry to interplead, for the purpose of determining the ownership of the bonds and the amount of fees to which Mr. Terry is entitled, if any.

The prayers of this petition were granted, and an auditor was appointed. The appellant company, through its then attorney G. Harry Davis, Esq., filed a formal written protest against the appointment of the auditor, and denied wholly and entirely his jurisdiction in the premises. This protest was overruled, and the auditor heard testimony and prepared and presented a report, in which he found that the appellant com-

pany should pay Mr. Terry a fee of ten per centum of $89,500 of bonds, or $8,950 in bonds, and $50.00 for costs expended by Mr. Terry, subject to a deduction of $500 already paid to him, and that it should also pay the costs of the audit, $1,000.

Upon exceptions taken to the auditor's report, the court of common pleas sustained the auditor in assuming jurisdiction, but reduced Mr. Terry's fee to $6,500 in bonds, together with interest coupons attached to said bonds from January 1, 1899, and also allowed $50.00 in cash to Mr. Terry, and $1,000 to the auditor, to be raised by the sale of sufficient bonds in the custody of the court.

From this action of the court, and the decree entered in pursuance thereof, this appeal is taken. We are confronted at the outset with the question of jurisdiction in the court below, and of its right to thus adjudicate the claim of Mr. Terry for fees. In our judgment, no good reason can be given for sustaining the assumption of jurisdiction in this matter. Mr. Terry had no lien upon the bonds of the defendant company, either while they were in the custody of the guarantors' company, or after they were deposited with the prothonotary.

It is a well recognized general rule of law that an attorney has a lien, or rather a right of defalcation, on money or papers of his client while they are in his hands; but in a common-law action he has no such right of lien on his client's money in the hands of third persons, or upon a fund brought into court for distribution: Irwin v. Workman, 3 Watts, 357; Balsbaugh v. Frazer, 19 Pa. 95; Dubois's Appeal, 38 Pa. 231.

While a chancellor has power to direct the payment of reasonable counsel fees, out of a fund for distribution, when the fund is the product of the attorney's labors, and he has agreed to look to it solely for compensation, as was held in McKelvy's Appeal, 108 Pa. 615, yet that case distinctly recognized the doctrine of Dubois's Appeal, supra. The facts in McKelvy's Appeal are sufficiently distinctive, to take it out of the general rule. It was there found that the fund was due in great measure to the services of the attorney, and that he was to look to that fund for his compensation. Neither of these facts appear in this case. While Mr. Terry no doubt rendered good service to his client in aiding it to recover bonds wrongfully converted or claimed by others, yet this does not justify a claim to the

creation of the fund, represented by the bonds. Nor does it appear that the appellant company was attempting to take the fund out of the control of the court, by the aid of their counsel, with any intention of defrauding Mr. Terry out of his fees. There is therefore no apparent reason why the court should be called upon to interfere in any extraordinary way, for his protection. It is admitted that valuable services were rendered by Mr. Terry, and the dispute is only as to the amount of compensation to be made therefor. This is purely a question of fact. Mr. Terry having no right to a lien upon the bonds in question, and there being no equitable consideration sufficient to move the conscience of a chancellor to interfere, we cannot justify the court below in assuming jurisdiction of the matter in dispute. Its action in so doing, against the formal protest of the appellant company, was error. It cannot be contended that Mr. Terry has not an adequate and complete remedy at law, and having that remedy, we see no reason why he should not be required to establish the amount of his claim before a jury, as other litigants whose claims are disputed are required to do.

It is unnecessary to consider the other points urged in the appeal, as the denial of the jurisdiction of the court disposes of the questions raised as to the reasonableness of the fee, as this may be passed upon by a jury.

The assignments of error which question the jurisdiction of the court are sustained, and the decree of the court below is reversed.

Quakertown & Eastern Railroad Company *v.* Guarantors' Liability Indemnity Company of Pennsylvania.

Argued Jan. 28, 1903. Appeal, No. 352, Jan. T., 1902, by Henry C. Terry, from decree of C. P. No. 1, Phila. Co., March Term, 1898, No. 580, dismissing exceptions to auditor's report in case of Quakertown & Eastern Railroad Company v. Guarantors' Liability Indemnity Company of Pennsylvania et al. Before MITCHELL, DEAN, BROWN, MESTREZAT and POTTER, JJ. Reversed.

OPINION BY MR. JUSTICE POTTER, May 25, 1903:

The opinion which has just been filed, Quakertown & E. R. R. Co. v. Guarantors L. I. Co., ante, p. 350, disposes of this appeal. We there held that the court below had no jurisdiction to determine the matter in dispute, but that the questions of fact involved must be submittted to a jury. This appeal is therefore dismissed.

Holt, Appellant, *v.* Pennsylvania Railroad Company.

Negligence—Railroads—Tracks in street.

Where the tracks of a steam railroad are laid in a public street, the driver of a wagon lawfully using the track in front of an approaching train, while it is his duty to give way and not obstruct its progress, is entitled to reasonable warning and reasonable time to get out of the way. The employees of the railroad are bound to keep the train under control and have no right to run into the traveler either upon the track or while in the act of leaving it. They are bound to use every reasonable effort to avoid a collision.

In an action against a railroad company to recover damages for personal injuries, it appeared that the railroad company occupied a portion of the street with a track laid in the same manner as street car tracks, and paved in with Belgian blocks. There were two street car tracks also on the street. The whole street was used by the public. The plaintiff while driving a heavily loaded wagon was forced by reason of street cars on the trolley tracks and wagons on one side of the street to turn his wagon, so as to drive for a distance of about 140 feet with one wheel of his wagon between the rails of the railroad track. He drove in this way about four minutes, and was beginning to turn back towards the trolley track, when his wagon was struck in the rear by a locomotive. *Held*, that the question of plaintiff's contributory negligence and defendant's negligence was for the jury.

Argued March 23, 1903. Appeal, No. 332, Jan. T., 1902, by plaintiff, from order of C. P. No. 5, Phila. Co., March T., 1901, No. 119, refusing to take off nonsuit in case of Thomas E. Holt v. Pennsylvania Railroad Company. Before MITCHELL, FELL, BROWN, MESTREZAT and POTTER, JJ. Reversed.

Trespass to recover damages for personal injuries. Before DAVIS, J.

The facts are stated in the opinion of the Supreme Court.

Error assigned was refusal to take off nonsuit.

William G. Keir, for appellant.—The many cases in Pennsylvania holding it contributory negligence for persons to pass along tracks longitudinally of railroad or trolley companies are invariably those of pedestrians, and there are no rulings whatsoever as to persons with horses and wagons. These foot passers in trolley car cases were walking on the tracks longitudinally in the street between curb lines, where they had no right to be. Their duty was to pass along bordering pavements.

The plaintiff in this case was in a wagon and his proper place was on the street. The entire street from curb to curb is the place of passage, and the territory of drivers and their teams subject no doubt to the paramount right of the trolley cars and freight trains when they give notice of their presence on the track behind. In Pennsylvania there are no reported cases strictly analogous to this. There are several, however, in which railroads had been constructed on the beds of public streets, but in these cases the evidence shows they had lost all their identity as public thoroughfares and became completely "railroad highways" with no paving in connection with the railroad tracks. But indeed in these cases the trend of thought is clearly indicated as to the regard and consideration for the rights of the public on railroad tracks when they are laid in cities on ground that has even the slightest appearance of a public thoroughfare: P. & R. R. Co. v. Long, 75 Pa. 257; Penna. R. R. Co. v. Lewis, 79 Pa. 33.

When we turn to other states, however, we find many cases identical with this one, and they all very forcibly hold, without a single exception, that where railroad tracks are laid upon a public street there remains in the public a right of "common user" with the railroad company, and citizens may pass across them and lengthwise, and not be considered trespassers or guilty of contributory negligence: Louisville, etc., R. R. Co. v. Phillips, 112 Ind. 59 (13 N. E. Repr. 132); Smedis v. Brooklyn, etc., R. R. Co., 88 N. Y. 13; Hegan v. Eighth Avenue R. R. Co., 15 N. Y. 380; Kansas Pac. Ry. Co. v. Pointer, 9 Kansas, 620.

John Hampton Barnes and *George Tucker Bispham*, for ap-

pellee.—It is submitted that plaintiff was guilty of contributory negligence in three particulars:

1. In turning into the track without looking back immediately before he turned.

2. In not looking back after getting his wagon wheel over the rail of the railroad; and

3. In not turning to the left, into the open space of the paved street, where there was ample room to drive: Mulherrin v. Del., etc., R. R. Co., 81 Pa. 366; Pittsburg, etc., R. R. Co. v. Collins, 87 Pa. 405; Moore v. Penna. R. R. Co., 99 Pa. 301; Moore v. P. W. & B. R. R. Co., 108 Pa. 349; Loughrey v. Penna. R. R. Co., 201 Pa. 207; Gilmartin v. Transit Co., 186 Pa. 193; Smith v. Traction Co., 187 Pa. 110; Penman v. Ry. Co., 201 Pa. 247.

There was no sufficient evidence of negligence upon the part of the defendant. There was no evidence of improper speed: Yingst v. Railway Co., 167 Pa. 438; Kline v. Traction Co., 181 Pa. 276; Smith v. Railway Co., 187 Pa. 451; Custer v. R. R. Co., 19 Pa. Superior Ct. 365.

Opinion by Mr. Justice Potter, May 25, 1903:

It appears from the evidence in this case that, upon a portion of Richmond street in Philadelphia, two tracks for a street railway, and one track for a steam railroad, are laid. The street railway tracks are in the center, and the railroad track is at one side. All the tracks are so laid with respect to the paving as not to impede the use of the street by vehicles and the general public.

The railroad track is used for the movement of freight trains only. The plaintiff was familiar with the locality, having driven over it frequently. Upon the afternoon of January 9, 1901, he was driving a horse and wagon, loaded with iron, going north upon the easterly track of the trolley road. When near Huntingdon street, a trolley car behind him rang its bell for him to clear its track. A south-bound trolley car was approaching him upon the other trolley track, and several wagons were in the space between the trolley tracks and the west side of the street. He therefore turned to the right, and over upon that portion of the street, where the railroad track of the defendant company was laid. He continued to drive along the street,

with one wheel of his wagon between the rails of the railroad track, until the trolley cars behind him had passed. In this way he consumed about four minutes of time, and traveled about 140 feet. He was beginning to turn again to the left, in order to get back into the trolley track, as the way was then open for him to do, when his wagon was struck in the rear by a locomotive engine of the defendant company. The shock was not very severe, but it was sufficient to drive an iron shaft which lay in the wagon with considerable force against the plaintiff's back. To recover for resulting injuries this action was brought.

Upon the trial, the learned judge of the court below was of the opinion that the plaintiff was guilty of contributory negligence in driving upon the part of the street where the railroad track was laid, and in continuing there until his wagon was struck in the rear by the approaching engine. He therefore entered judgment of compulsory nonsuit, and his subsequent refusal to take it off is here assigned as error.

This is not a case of one turning into the track in front of an approaching train, and being immediately struck. If it were, the court below would unquestionably have been right in pronouncing it contributory negligence.

The plaintiff was occupying the portion of the street included between the rails for several moments before the accident, and was driving slowly along, and was in the act of turning back into the trolley track when his wagon was struck by the engine. The case was tried in the court below, evidently upon the theory that the rights of the defendant to the use of the railroad track at the place of the accident were precisely the same as, and no less than, they are where laid upon its own right of way, purchased or condemned by it, and appropriated to its exclusive use.

If the place in question was the exclusive roadway of the company, in which the public had no right of passage, then the defendant would not be liable to one who drove upon it, unless the injury were wilfully or intentionally inflicted.

But if it was a street which the public had a right to use, then, even if it were occupied in part by the track of the railroad, no one driving upon it, and making such use of the

street as it is ordinarily and manifestly intended for, could be considered as a trespasser. It is true that such a one might be guilty of contributory negligence, in the manner in which he made use of the street, and drove upon the track, but he could not from the mere fact of being upon the track as laid in the street, be considered a trespasser, and held to forfeit his right to exact from the railroad company a reasonable degree of care in the running of its trains.

In the present case, it is admitted that the accident occurred upon a public street, and nothing appears in the evidence to show that the defendant company had anything more than a right to lay down a railroad track therein, and run cars thereon. The track was not raised above the level of the street, but was laid in the same manner as the street car tracks, and was paved in with Belgian blocks. All this indicated that the street retained its character as a public highway, for the use of all kinds of vehicles. Under these circumstances it could not be considered negligence, in itself, for a citizen to drive over or along the track.

At this particular point, the street was occupied with two tracks of a street railway, and one track of a steam railroad; and it is not apparent that the rights of the latter to the use of the street differed in any degree from those of the street railway. In fact, the argument of the appellee is in part directed to the application to this case, of the decisions in street railway cases upon contributory negligence. And if the facts justified their application here, such authorities would certainly be appropriate and controlling. But in none of the cases cited, do we find sufficient similarity in the facts, to those now under consideration, to make them available to sustain the action of the court below. In Winter v. Federal St., etc., Pass. Railway Co., 153 Pa. 26, the doctrine was carried to the extreme, but there the plaintiff turned his wagon squarely across the track, and left it there while he was unloading; and depended upon the defendant company to avoid a collision, by stopping its car in time, while approaching upon a down grade. In Gilmore v. Federal St., etc., Pass. Railway Co., 153 Pa. 31, there was like gross negligence upon the part of the plaintiff. The cases of Gilmartin v. Lackawanna Valley Transit Co., 186 Pa. 193, and Penman v. McKeesport, etc., Railway Co., 201 Pa.

247, were those in which the plaintiffs were struck while walking at night, longitudinally on the tracks. There is a manifest difference in the rule which should properly be applied to pedestrians who make an unfitting use of the street way in converting it into a footway, and that which is appropriate to drivers of teams who have a right to use with due care, any portion of a public driveway. Each has its appropriate purpose, the street for the use of the horse and vehicle, the sidewalk for the pedestrian. When either is found in the place set apart for the other, it is manifestly out of the ordinary. In the present case, the plaintiff was making a proper and legitimate use of the street. The conditions under which the railroad company laid and used its tracks at that point, made it incumbent upon it to operate its trains with due regard to the safety of other people who were also rightfully using the street, at the same time.

The testimony shows that when it became necessary for the plaintiff to turn out of the trolley track, and to pass over to the railroad track, he did not drive immediately in front of the approaching train. On the contrary he drove steadily along the street for a distance of perhaps 140 feet; occupying, as was estimated, about four minutes of time before his wagon was reached and struck by the engine. The latter in the same time had run only about 340 feet, so that it is difficult to see why the engine running so very slowly might not have been stopped before striking the wagon of the plaintiff. However that was a matter of defense which might have been satisfactorily explained to the jury. But it was for them rather than for the court. If the plaintiff was lawfully using the track in front of the approaching train, while it was his duty to give way to it, and not obstruct its progress, yet he was entitled to reasonable warning and reasonable time to get out of the way. The employees of the railroad were bound to keep the train under proper control, and they had no right to run into plaintiff either upon the track, or while in the act of leaving it. They were bound to use every reasonable effort to avoid a collision. Whether or not they did so, was a question of fact, and this, as well as the question of any contributory negligence upon the part of the plaintiff should, under proper instructions, have been left to the jury. It was certainly not so clear

as to justify the court in pronouncing upon it as a matter of law.

The assignments of error are sustained, and the judgment is reversed, and a venire facias de novo is awarded.

Fink, Appellant, *v.* Van Fossen.

Deeds—Evidence—Parol evidence.

On a bill in equity to cancel a deed, it appeared that at the time the bill was filed both grantor and grantee were dead. The grantor was the uncle of the grantee, and survived the grantee several years. There was evidence offered as to conversations between the parties to the effect that the grantee was to support and maintain the grantor, but these conversations were not connected closely enough with the execution of the deed to make them part of the res gestae. There was evidence that the grantee in his last illness said to the grantor, "I cannot live to fulfill my contract—you will have to take your property into your own hands." It did not appear that the grantor took any steps to regain the property, and when he died it still stood in the grantee's name. *Held*, that the evidence was insufficient to sustain a cancelation of the deed in favor of the heirs of the grantor.

Argued April 13, 1903. Appeal, No. 244, Jan. T., 1902, by plaintiff, from decree of C. P. Luzerne Co., Feb. T., 1901, No. 5, dismissing bill in equity in case of Frank Fink et al. v. Franklin E. Van Fossen, Guardian of Lucy May Kicherer. Before MITCHELL, DEAN, FELL, BROWN and MESTREZAT, JJ. Affirmed.

Bill in equity to cancel a deed.

FERRIS, J., found the facts to be as follows:

1. On and before September 18, 1883, Thomas Fink was the owner in fee of the land described in the plaintiff's bill. On that date, he, with his wife, executed and delivered to Frank Kicherer a deed in fee simple therefor, which was duly recorded October 25 of the same year. A money consideration of $2,000 was mentioned in the deed, and a separate receipt for the same was indorsed upon and recorded with that instrument.

2. That said Frank Kicherer died on April 3, 1890, intestate, leaving to survive him a widow, now Nora Van Fossen, and one child, Lucy Kicherer, a minor, who now has as her guardian Franklin E. Van Fossen, who is the defendant in this suit.

3. There is no evidence of what took place at the time of the execution of the deed in question other than that afforded by the document itself; nor is there any evidence that the purchase money was not paid in cash or some agreed upon equivalent therefor, nor that the execution of the deed was induced by fraud or undue influence, nor any from which those facts or either of them could be fairly inferred.

4. The grantee Kicherer, at the date of the deed and prior thereto, resided with the grantor, Fink, who was his uncle, and they continued to reside together on the farm in question, each of them doing work thereon, until Kicherer's death in 1890. After his death Fink and his wife continued to occupy the premises until they died in 1900. There is no evidence that the relations between Kicherer and Fink and his wife during the seven years that elapsed from the date of the deed to that of the former's death were otherwise than harmonious and affectionate, or that any complaints were made by either Fink or his wife that Kicherer failed in any way in the performance of any duty toward them, whether such duty arose from contract or otherwise.

5. After the date of the deed both Fink and Kicherer treated the property as belonging to the latter. Kicherer made improvements upon it, and it was assessed in his name from 1884 to 1890, inclusive, and in the name of his "estate" from 1891 to 1897, both inclusive, and from 1889 to 1900, both inclusive, it was assessed in the individual name of Thomas Fink, who was at that time guardian of the estate of Lucy M. Kicherer, the child and heir of Frank Kicherer. There is no evidence as to how or why the assessment was so changed.

6. Thomas Fink admitted at several times to certain witnesses who testified at the trial, that the ownership of said farm was in Frank Kicherer during his lifetime, and was in his only child and heir at law, Lucy M. Kicherer, after the death of her said father.

7. Thomas Fink in his lifetime took no legal steps to annul

the said deed, nor was any written evidence produced at the trial tending to show that Kicherer took or at any time held this farm in trust from Thomas Fink or any other person, nor was there any written evidence tending to vary or modify in any way the effect of the deed as an absolute conveyance in fee simple upon a good and sufficient consideration; nor is any such trust relation, or such variance or modification of the deed shown by the clear, precise and indubitable testimony of two witnesses or of one with proof of corroborating circumstances equivalent to the testimony of a second witness. On the contrary, the weight of the oral evidence sustains the deed as an absolute conveyance according to its terms.

Testimony was given tending to show that Kicherer, shortly before his death and while in the extremity of his last illness, said, in effect, that the farm should revert to Fink, because he (Kicherer) could not live to fulfill his contract. What that contract was does not appear. The plaintiffs, however, contend that it was an understanding on the part of Kicherer to provide for the support of Fink and his wife during their joint lives and the life of the survivor and for their suitable burial after death. It is not shown, or even alleged, that this agreement, if there was one, was ever reduced to writing. Some evidence has been given, though of a vague and unsatisfactory character, of declarations tending to show the existence of some such understanding and upon this evidence it is sought to build up a theory that a trust ex malificio arose in favor of Fink and his wife. The evidence is wholly insufficient to establish this claim.

Error assigned was decree dismissing the bill.

W. H. Hines, for appellants.

Samuel L. Fedder and *James M. Fritz*, for appellee.

Per Curiam, May 25, 1903:

The learned judge below found as a fact that "there is no evidence of what took place at the time of the execution of the deed in question other than that afforded by the document itself; nor is there any evidence that the purchase money was

not paid in cash or some agreed upon equivalent therefor, nor that the execution of the deed was induced by fraud or undue influence, nor any from which those facts or either of them could be fairly inferred."

It is objected to this finding by the appellant that it is incorrect because there was evidence as to conversations between Fink and his grantee, Kicherer, as to the terms on which the conveyance was to be made. The witness stated that the conversation to which he testified was "just before" the execution of the deed, but on cross-examination he said it was "along through the summer, towards fall, I don't remember the date." The deed was made on September 18, and the conversation testified to was not connected closely enough with the execution to make it part of the res gestæ or sufficient to vary the terms of the writing.

Appellant further calls attention to the declarations of Kicherer in his last sickness to Fink: "I cannot live to fulfil my contract—you will have to take your property into your own hands," etc. The utmost that these declarations amount to is that Kicherer thought Fink had a right to rescind the conveyance. Whether in view of the act of 1856, and the absence of any evidence of fraud, Fink had any such right or not, we need not consider. Conceding for argument sake that he had, he chose not to enforce it. The judge found on this point that "after the date of the deed both Fink and Kicherer treated the property as belonging to the latter; Kicherer made improvements upon it, and it was assessed in his name from 1884 to 1890, inclusive, and in the name of his 'estate' from 1891 to 1897, both inclusive, and from 1889 to 1900, both inclusive, it was assessed in the individual name of Thomas Fink, who was at that time guardian of the estate of Lucy M. Kicherer, the child and heir of Frank Kicherer. There is no evidence as to how or why the assessment was so changed."

This finding disposes of any claim the appellants as heirs of Fink might have to do in his right what he clearly refused to do for himself.

Decree affirmed with costs.

McAndrew's Estate.

Wills—Probate—Register of wills—Revocation.

After the register of wills has admitted a will to probate, he has no power to entertain a petition for the revocation of the probate.

Will—Probate—Evidence—Identity of testatrix.

A paper signed with a mark and dated three years prior to the death of testatrix will not be admitted to probate where the evidence showed that the paper was prepared by a justice of the peace and executed before him by a woman whom he did not know; that one of the witnesses did not know the woman; that the other who apparently did know her was dead when the paper was offered for probate; that another woman present at the time of the execution, and to whom the paper was given, was also dead; that the paper was discovered in the effects of this woman three years afterwards; that the testatrix although attending the latter's funeral had never made any request or search for the paper; and that the paper offered made as the principal beneficiary of the estate, a person stranger in blood to testatrix, and with whom she had little to do.

Argued April 14, 1903. Appeal, No. 34, Jan. T., 1903, by Michael Moughan, from decree of O. C. Luzerne Co., No. 447, of 1901, refusing to admit to probate a will in estate of Catherine McAndrew, deceased. Before MITCHELL, DEAN, FELL, BROWN and MESTREZAT, JJ. Affirmed.

Appeal from register of wills.

FREAS, P. J., filed the following opinion:

Catharine McAndrew died October 17, 1901, and her will dated March 29, 1884, was probated October 26, 1901. On January 31, 1902, the petition of Michael Moughan was presented to the register asking that the probate of the aforesaid will be vacated and annulled, and that an alleged will dated May 14, 1898, be probated. Testimony was taken before the register and the case proceeded in, and the register filed an opinion on March 10, 1902, refusing to strike off the decree of probate of the will dated March 29, 1884. An appeal from this decree was taken March 29, 1902, and was submitted to the court upon argument of counsel and the testimony taken before the register. The register's powers ceased with the pro-

bate of the first will, and he had no authority to entertain a petition for revocation: Beatty's Estate, 193 Pa. 304.

But as the case is now before us by consent of all the parties in interest we will proceed to dispose of it as though the appeal had been regularly entered.

The only question before us is whether the paper dated May 14, 1898, is the last will and testament of Catharine McAndrew, late of Pringle Hill, Kingston township, Luzerne county, deceased. At the date of the last will a woman giving her name as Catharine McAndrew, accompanied by Mary Queeney and William J. Lyons, appeared before P. H. Sheridan, an alderman of the city of Pittston, and at the request of the testatrix the alderman drew the paper in question. It was witnessed by Lyons and J. H. McLane, the latter being called in for that purpose and to whom the decedent was unknown. Lyons is dead but his signature was identified. After execution the paper was given by the testatrix to Mary Queeney who died January 20, 1899. After Mary Queeney's death all her few belongings were taken possession of by Bridget Tigue, and among them was a bureau, one drawer of which was filled with bed sheets. For over three years the contents of this drawer were allowed to remain undisturbed, when finally its contents were taken out and examined, the alleged will dropped out and was subsequently offered for probate. Of those present at the signing of the supposed will only Mary Queeney and Lyons knew the testatrix, and both are dead, and there is no one living who can testify to the identity of the testatrix. Although Mary Queeney died eight months after the making of the will and delivery to her for safe-keeping and thirty-three months before Catharine McAndrew died, who attended the funeral of the former, yet there is no testimony showing that the testatrix ever caused any search to be made for the alleged will. It seems natural to suppose that if she had given her friend for safe-keeping so important a document as a will disposing of her entire estate, she would have instituted a search among her dead friend's effects, or made inquiries for its recovery. Had she done so Bridget Tigue, above all persons in the world, would have known it, yet this witness denies any knowledge of the will previous to its accidental discovery three years later. The husband of the testatrix, Thomas McAn-

drew, died December 14, 1901, before the last will was produced.

Many wills are witnessed by persons not acquainted with the maker, and that sometimes when the testator signs by mark as in this case, but the attending circumstances must be such as to preclude possibility, or at least probability of fraud. The subsequent custody of the instrument, the relations of the testator and beneficiaries, truthfulness of the witnesses and inherent probability of the instrument itself are circumstances from which its genuineness must be considered. It taxes our credulity very strongly to believe the testimony offered as to the whereabouts of the alleged will. It does not bear the impress of truth or seem probable under the circumstances. The chief beneficiary claims to be a cousin of testatrix, while her own sister denies it, and states emphatically that they had never known Moughan in Ireland at the time he said he knew them, and that his testimony in many respects is false. The sister should know the facts, and undoubtedly told the truth. The alleged will cuts off the natural heirs of the testatrix with small bequests and leaves nearly all the estate to a stranger to her blood, who seldom visited her, and so far as the testimony shows had done nothing for her. There is no living witness to show that the maker of the will offered was Catharine McAndrew of Pringle Hill, but it is plain from the instrument itself that she is the person intended. Either Catharine McAndrew from Pringle Hill signed the paper offered or it is a forgery. It does not seem possible that any other person could fulfill the conditions. That some one purporting to be this Catharine McAndrew did appear before Alderman Sheridan and signed the paper in question seems true from the testimony, but we are of the opinion from all the circumstances in the case that she was an impostor. To admit a will to probate resting on such testimony as this one would be to invite fraud and forgery in every case where an illiterate person died leaving only collateral heirs.

Assumed kinship, the testimony of a few obliging neighbors as to declarations by testatrix of her intentions, an impostor to make her mark to the will in the presence of possibly honest witnesses to whom the testatrix is unknown, and the production of the will with a more or less plausible explanation of

its disappearance after all are dead who could know the facts, and the trick is done.

The identity of the testator is of prime importance, and that has not been satisfactorily established in this case. The appeal is dismissed.

Error assigned was in dismissing the appeal from register of wills.

T. R. Martin and *M. N. Donnelly*, for appellant.—It will be considered prima facie evidence to show that a party bearing the same name as the party to the suit did the act with which it is sought to affect such party: Hamsher v. Kline, 57 Pa. 397; McConeghy v. Kirk, 68 Pa. 200.

Identity of name is prima facie evidence of identity of person: Hamsher v. Kline, 57 Pa. 397; Weigel v. Weigel, 5 Watts, 486; Goddell v. Hibbard, 32 Mich. 47; Wharton's Law of Evidence, sec. 1273.

The legal presumption until rebutted is in favor of fairness, and it coincides in this instance with the presumption which the law deduces from the ordinary routine of business in the general course of affairs: Weigel v. Weigel, 5 Watts, 486; Miller's Estate, 3 Rawle, 312.

The presumption is always against fraud, and in favor of innocence, and the burden of proving fraud is upon the party who sets it up: Cummings v. Hurlbutt, 92 Pa. 165; Abbey v. Dewey, 25 Pa. 413; Douglass v. Mitchell, 35 Pa. 440.

David B. Gildea and *John T. Lenahan*, for appellee, were not heard.

PER CURIAM, May 25, 1903:

The decree is affirmed on the opinion of the court below. Costs to be paid by the appellant.

McConnell *v.* Pennsylvania Railroad Company.

Appeals—Charge—Exceptions—Quashing appeal.

An appeal will be quashed where the only errors assigned are to the charge of the court, and it appears that no exception was taken to the charge at the trial.

Argued March 23, 1903. Appeal, No. 63, Jan. T., 1903, by plaintiff, from judgment of C. P. No. 1, Phila. Co., March T., 1900, No. 933. Before MITCHELL, FELL, BROWN, MESTREZAT and POTTER, JJ. Appeal quashed.

Edwin Jaquett Sellers, for the motion.

Francis G. Gallagher, contra.

PER CURIAM, May 25, 1903:

It appearing that no exception was taken to the charge of the court below, and the only errors assigned here being to the charge, the appeal must be quashed: Curtis v. Winston, 186 Pa. 492.

Appeal quashed.

Andrews, Appellant, *v.* Blue Ridge Packing Company.

Practice, C. P.—Affidavit of defense—Function of affidavit.

An affidavit of defense should set forth fully and fairly facts sufficient, to show prima facie a good defense, and if it fails to do so, either from omission of essential facts, or manifest evasiveness in the mode of statement, it will be insufficient to prevent judgment. But if not deficient in either of these respects, and on its face fairly setting forth a prima facie defense, it is not to be subjected to close technical examination as if it was a special plea demurred to. Its office is to prevent a summary judgment and for that purpose a showing of a defense, with certainty to a common intent is sufficient.

Practice, C. P.—Affidavit of defense—Corporation—Officer.

Where the business manager of a defendant corporation swears to an

affidavit of defense as to matters of his own knowledge, it is unnecessary for him to set forth his information and belief.

Affidavit of defense—Contract—Set-off.

In an action on promissory notes, an affidavit of defense is sufficient which avers that plaintiff's claim was for money due on certain promissory notes given as memoranda for advancements by plaintiff to defendant on a contract under which the plaintiff was to take and sell on commission the entire product of defendant's fruit packing operations; that plaintiff had refused to take the whole product, whereby part of it was left over the season, to defendant's loss; that plaintiff had not accounted and given credit for the whole of the goods actually taken, had overcharged commissions on the part sold and accounted for; and that the plaintiff upon these transactions was indebted to the defendant in a greater sum than the amount of the notes sued upon.

Practice, C. P.—Affidavit of defense—Supplemental affidavit of defense—Discretion of court—Allowance.

A supplemental affidavit of defense will be allowed if the court deems the defense to be probably good, but defectively stated in the original affidavit; a second or third supplemental affidavit may even be allowed. The extent of the indulgence is largely in the discretion of the court.

History of affidavit of defense law. Per MITCHELL, J.

Argued April 14, 1903. Appeal, No. 327, Jan. T., 1902, by plaintiffs, from decree of C. P. Luzerne Co., Dec. T., 1901, No. 365, discharging rule for judgment for want of sufficient affidavit of defense in case of B. W. Andrews and George M. Randall, trading as B. W. Andrews & Company v. Blue Ridge Packing Company. Before MITCHELL, DEAN, FELL, BROWN and MESTREZAT, JJ. Affirmed.

Assumpsit on promissory notes.

Rule for judgment for want of sufficient affidavit of defense.

The material averments of the affidavit of defense are stated in the opinion of the Supreme Court.

Errors assigned were in discharging rule for judgment, and in allowing a second supplemental affidavit of defense to be filed.

Felix Ansart, with him *John G. Johnson*, for appellant.—The affidavits of defense in this case do not conform to the requirements of the law, as given in the following cases: Ogden v. Beatty, 137 Pa. 197; Class v. Kingsley, 142 Pa. 636;

Superior Nat. Bank v. Stadelman, 153 Pa. 634; Ettinger v. Miller, 153 Pa. 457; Killan v. Brown, 6 Pa. Superior Ct. 15; Sanders v. Sharp, 153 Pa. 555; Cosgrave v. Hammill, 173 Pa. 207; Close v. Hancock, 3 Pa. Superior Ct. 207; Loeser v. Erie City Rag. Warehouse, 10 Pa. Superior Ct. 540.

John T. Lenahan, with him *T. J. Chase*, for appellee.

Opinion by Mr. Justice Mitchell, May 25, 1903:

An affidavit of defense should set forth fully and fairly, facts sufficient to show prima facie, a good defense, and if it fails to do so, either from omission of essential facts, or manifest evasiveness in the mode of statement, it will be insufficient to prevent judgment. But if not deficient in either of these respects, and on its face fairly setting forth a prima facie defense, it is not to be subjected to close technical examination as if it was a special plea demurred to. Its office is to prevent a summary judgment and for that purpose a showing of a defense, with certainty to a common intent, is sufficient.

Tested by this standard the first affidavit of defense was sufficient. It was made by the business manager of the defendant in positive terms. As such officer he must be presumed to be acquainted with the facts and as he took the responsibility of swearing positively as of his own knowledge, it was unnecessary for him to set forth his information and belief: Newbold v. Pennock, 154 Pa. 591; Wolf v. Jacobs, 187 Pa. 260.

The affidavit set up a defense to the whole of plaintiff's claim, arising from a set-off in the same transaction. The defense in substance is that plaintiff's claim is for money due on certain promissory notes given as memoranda for advancements by plaintiff to defendant on a contract under which the plaintiff was to take and sell on commission the entire product of defendant's fruit packing operations; that plaintiff had refused to take the whole product, whereby part of it was left over the season, to defendant's loss, that plaintiff had not accounted and given credit for the whole of the goods actually taken, had overcharged commissions on the part sold and accounted for; and that the plaintiff upon these transactions was indebted to the defendant in a greater sum than the amount of the notes sued upon.

If made out as to the facts this was a good defense to the whole claim. So far as it rested on the contract the court having the latter before it, could look into the respective obligations of the parties, but as to the failure to account for goods sold, and the overcharge in regard to commissions, the result could only be shown by testimony as to facts, and a critical examination of the accounts which can only be had at a trial.

The supplemental affidavits though they complicate the statement of facts somewhat do not materially vary the defense, and as the original was sufficient they were unnecessary. If the insufficiency of an affidavit is manifestly in the substance of a defense, or if evasiveness is patent in the manner of statement, it is usual and proper to give judgment, but otherwise a supplemental affidavit is allowable and is usually allowed.

The origin of the affidavit of defense law was in an agreement of the Philadelphia Bar in 1795 (see note by Mr. W. W. Carr to Detmold v. Gate Vein Coal Co., 3 Weekly Notes Cases, 567), subsequently enforced by rule of court, the validity of which was sustained in Vanatta v. Anderson, 3 Binn. 417. The affidavit under this rule however was only that to the best of defendant's knowledge and belief there was a just and good defense. But under the act of 1835 in relation to the district court of Philadelphia, it was required that the affidavit should state "the nature and character" of the defense. Under this act the district court held that to enable the court to judge of the nature and character of the defense, the affidavit must set forth the facts. The question then at once arose as to the sufficiency of the facts stated to constitute a good defense and the practice of granting judgments for want of a sufficient affidavit rested for half a century on "the uncontrovertible judicial deduction, that an insufficient affidavit was legally no affidavit at all:" Stedman v. Poterie, 139 Pa. 100. In Walker v. Morgan, 2 Weekly Notes of Cases, 173, WILLIAMS, J., refers to the fact that no act of assembly had given the courts of Allegheny county authority to enter judgment for want of a sufficient affidavit of defense, and there was no general statute giving express sanction to such judgments until the procedure act of 1887. Long before that however the practice had become general and was established beyond

question. As a corollary the practice was equally well established to allow a supplement affidavit "if the court deem the defense to be probably good but defectively stated:" 1 Troubat & Haly, sec. 423. This was done in the interest of justice, and the same reasons that move the court to allow a supplemental affidavit may move it to allow a second or third supplemental, if it still appears probable that the defense is good and the defect merely in the mode of statement. The extent of the indulgence is largely in the discretion of the court.

Order affirmed.

Crowe, Appellant, *v.* Nanticoke Light Company.

Negligence—Electric light companies—Presumption.

In an action against an electric light company to recover damages for the death of plaintiff's husband, it appeared that the deceased on the evening of the accident attempted to turn on an incandescent electric light in his barroom, and immediately received a severe shock which knocked him down. In falling he carried the glass bulb with him. He immediately sprang up saying, "What is that?" put the bulb to the socket and received a shock which killed him. The evidence showed that at another house 200 feet distant, and on the same incandescent circuit, the occupant on the same evening received a severe shock from an incandescent light. It also appeared that at the latter place on the night in question some arc wire was stripped of insulation and had come in contact with the incandescent wire. There was no evidence, however, that the contact with the naked arc wire would produce any dangerous effect at the house of the deceased. The evidence also showed that the deceased had been a customer of the defendant company, but that the defendant company prior to the accident had leased and transferred its property and contracts, including the contract of deceased, to another electric light, heat and power company. *Held*, that it was not error to give binding instructions for the defendant.

Argued April 15, 1903. Appeal, No. 94, Jan. T., 1903, by plaintiff, from judgment of C. P. Luzerne Co., Oct. T., 1899, No. 769, on verdict for defendant in case of Annie Crowe v. Nanticoke Light Company. Before MITCHELL, DEAN, FELL, BROWN and MESTREZAT, JJ. Affirmed.

Trespass to recover damages for the death of plaintiff's husband. Before WHEATON, J.

At the trial it appeared that the deceased, Henry Crowe, became a customer of the defendant company on November 1, 1896, under a contract which was to continue for one year, and unless notice was given to the contrary, from year to year thereafter. On June 28, 1898, the defendant company leased and transferred its property and contracts to the People's Electric Heat & Power Company of Nanticoke. On the evening of August 19, 1898, the deceased, while in his barroom, reached up to turn on an incandescent electric light which was suspended from the ceiling. He immediately received a severe shock which knocked him down. In falling he carried with him the glass bulb. He immediately sprang up, saying, "What is that?" and attempted to insert the bulb in the socket, when he received a second shock which killed him. There was evidence that at the house of one Alexander which was on the same circuit, about 200 feet away from the house of the deceased, a person had received a shock at about the same time. There was also evidence that at Alexander's house some arc wire was stripped of insulation and had come in contact with the incandescent wire. There was no evidence, however, that a contact of a naked arc wire with an incandescent wire would produce dangerous results at the house of the deceased.

Plaintiff presented the following points:

1. There is no statutory provision enabling an electric light company to lease to an electric light, heat and power company. *Answer:* That may be so; but both these companies were heat, light and power companies, and I believe, under the law in companies of this character, there exists a power to lease. [8]

2. If there is such statutory authority, it is for the jury to say, under all the evidence, whether the Electric Light, Heat and Power Company were actually in possession of and operating the plant under the lease from the Nanticoke Light Company. *Answer:* That would be so if there were any evidence to warrant the submission of the matter to you. But there is no evidence of possession in the Nanticoke Light Company after June 29, 1898, and this accident did not happen until August 19, nearly two months after the People's Company had gone into possession and were running this plant. [9]

4. The plaintiff having shown continuous disturbances for

a considerable time prior to and the same evening of the accident and that the insulation on this circuit was frayed and hung in strips from the wires in places, and further that Cooper, the company's electrician, was at Crowe's place immediately after the accident repairing the circuit, and that E. N. Alexander, whose store lights were on the same circuit, was severely injured by receiving a shock at between eight and nine o'clock of the same evening, and that Cooper aforesaid was present at Alexander's within a few minutes after Alexander was hurt, and that other persons on same circuit received shocks the same night, raises a question which is for the jury to determine, as to whether or not the company had notice of the condition existing and the defective working of the system. *Answer:* That point I decline to affirm, for the reason stated in my general charge, because even if the company did have notice that wires were out of order up at Alexander's, and even if the company was negligent in having the wires out of order up at Alexander's, and even it had not been true that the wrong company had been sued in the lawsuit instead of the right company, then I say it would not make any difference what happened up at Alexander's unless the plaintiff had gone on and showed that what happened up at Alexander's was the cause of Harry Crowe's death. It would not be material, in other words, what happened up at Alexander's unless there was proof that whatever did happen there was what caused Harry Crowe's death. [10]

5. An electric light company furnishing electricity to a contract user for pay, is prima facie liable for injuries to the user if received by him while using the lights in the usual and ordinary manner. *Answer:* I decline to affirm that point if by prima facie is meant that by reason of the happening of the accident a presumption of negligence arises. That may be the law in some states, but I do not believe it to be the law in Pennsylvania. I do not think that the relation which exists between the company which furnishes a man an electric light on a contract and the consumer of that light is of such a character as warrants the assertion that the law as between them would be that if he gets hurt in using that electric light the presumption immediately arises that they have been guilty of negligence. I believe that the law remains with

them as with reference to other parties as a rule, and that where it is alleged that he is hurt by reason of the negligence of the company, it is his duty to prove that he was so hurt. [11]

The court gave binding instructions for defendant.

Verdict and judgment for defendant. Plaintiff appealed.

Errors assigned were (8–11) above instructions, quoting them; (14) in giving binding instructions for defendant.

Edmund G. Butler, with him *Harris B. Hamlin*, for appellant.—Where the thing that causes the injury is under the management of the defendant and the accident is such as in the ordinary course of things does not happen, the burden is on the defendant: Shafer v. Lacock, 168 Pa. 497; Oil Co. v. Penna. Torpedo Co., 190 Pa. 350; Dixey v. Phila., 180 Pa. 401; Fleming v. Ry. Co., 158 Pa. 130; Koelsch v. Phila. Co., 152 Pa. 355; Fitzgerald v. Edison Co., 200 Pa. 540.

The plaintiff having proved the contract and performance thereof by both parties thereto, that the electricity which killed her husband was furnished by the defendant company, which company rendered bills under the contract not only for August but also for September and October following, and received payment thereof from the plaintiff, the question was one for the jury under all the evidence.

The franchises and corporate rights of a company and the means vested in them necessary to the existence and maintenance of the object for which they were granted, are incapable of being granted away and transferred by any act of the company itself without express legislative authority: Susquehanna Canal Co. v. Bonham, 9 W. & S. 27; Stockton v. C. R. R. of N. J., 17 L. R. A. 97; Stewart v. L. V. R. R. Co., 38 N. J. 505; Stewart's Appeal, 56 Pa. 413, 422.

A franchise intended in a large measure to be exercised for the public good, any contract which disables the corporation, which undertakes to transfer to others the powers conferred, is void as against public policy: Thomas v. R. R. Co., 101 U. S. 71, 83.

James L. Morris, for appellee.—In such an action to show the mere happening of an accident, it is not enough to estab-

lish the alleged negligence of the defendant. Plaintiff must go further, and must prove by affirmative and direct evidence the particular negligence that caused the accident which is alleged to have caused the injury: Whitaker v. Delaware & Hudson Canal Co., 87 Pa. 34; Goshorn v. Smith, 92 Pa. 435; Huey v. Gahlenbeck, 121 Pa. 238; Reese v. Clark, 146 Pa. 465; Mixter v. Imperial Coal Co., 152 Pa. 395; Reese v. Hershey, 163 Pa. 253; Brunner v. Blaisdell Bros., 170 Pa. 25; Wojciechowski v. Spreckels's Sugar Refining Co., 177 Pa. 57; Snodgrass v. Carnegie Steel Co., 173 Pa. 228; Shafer v. Lacock, 168 Pa. 497; Alexander v. Penna. Water Co., 201 Pa. 252; Price v. Lehigh Valley R. R. Co., 202 Pa. 176.

An electric light company is a manufacturing corporation; therefore it has the right to lease its property: Com. v. Keystone Electric Light, Heat & Power Co., 193 Pa. 245; Potts v. Philadelphia, 195 Pa. 619; Schuylkill Co. v. Citizens' Gas Co., 148 Pa. 162.

There is nothing in the work of manufacturing and supplying electricity which cannot be carried on by the person who seeks to do it, without chartered rights from the state. Any individual may engage in the business of manufacturing and supplying electric light. To serve the general public he needs but a municipal franchise or grant of the right to pass over or upon its streets. Therefore, in this view of the case, it cannot be held that an electric light company is a public corporation: McLeod v. Central Normal School Assn., 152 Pa. 575; Girard Point Storage Co. v. Southwark Foundry Co., 105 Pa. 248; Reynolds v. Reynolds Lumber Co., 169 Pa. 626; Johnson Co. v. Miller, 174 Pa. 605.

A private corporation may lease its property for any purpose consistent with its charter, or may hold under lease premises necessary for its use: Baltimore, etc., Steamboat Co. v. McCutcheon, 13 Pa. 13.

Per Curiam, May 25, 1903:

The majority of the court are of opinion that the judgment should be affirmed but are not agreed upon the grounds of affirmance. No reasons therefore will be presented.

Judgment affirmed.

Commonwealth ex rel. *v.* Pittsburg, Appellant.

Municipalities—Municipal contracts Decision of director of department of public works.

Where a municipal contract provides that the decision of the director of the department of public works shall be final, conclusive and binding upon all parties, and the director signs and approves an estimate for the work done and materials furnished by the contractor, the estimate is conclusive upon the controller of the city, and he has no discretion to refuse to pay it. In mandamus proceedings against the controller to compel payment, he cannot successfully allege as a ground for refusal that the work was not done according to the contract; that it was improperly done in certain respects; that the doing of the work in the improper manner by the contractor was intentional, and that the director had notice of this before he approved of the work, but approved it notwithstanding.

MESTREZAT, J., dissents.

Argued April 28, 1903. Appeal, Nos. 64, 65, 66, 67 and 68, Oct. T., 1903, by John B. Larkin, from judgment of C. P. No. 2, Allegheny Co., Nos. 628, 629, 630, 631 and 632, Jan. T., 1903, in mandamus proceedings in case of Commonwealth ex rel. Mercantile Trust Company v. City of Pittsburg and John B. Larkin, City Controller. Before MITCHELL, DEAN, FELL, BROWN and MESTREZAT, JJ. Affirmed.

Petition for writ of mandamus. See Com. ex rel. v. Pittsburg, 204 Pa. 219.

From the record it appeared that on November 29, 1902, the court in an opinion by SHAFER, J., granted a writ of peremptory mandamus. Subsequently a motion was made to quash the writ on the ground that no notice had been given to the controller of the application for the writ. The court in an opinion by SHAFER, J., held that no notice was necessary to a public officer in a proceeding which concerned only the performance of public duties. He accordingly discharged the rule to quash. Subsequently on its being made to appear to the court that the controller had other reasons which he desired to present to the court as grounds for not countersigning the warrant, the court permitted the peremptory writ to be superseded, and allowed an alternative writ. Demurrers were filed to the returns of the several writs.

The courts sustained the demurrers, SHAFER, J., filing the following opinion:

These five demurrers to the return of several writs of alternative mandamus were argued together, and may be considered together; the writs being to enforce a countersigning of warrants for monthly estimates for as many amounts claimed to be due the relator, the first being for the month of May, 1902.

A similar proceeding was had as to the warrant for April, 1902, on which a peremptory writ was issued, and the judgment confirmed by the Supreme Court. Unless the present cases shall appear to be materially different from that case, they will be governed by it. Without repeating what has been said in the opinions heretofore filed in these cases, it is sufficient to say that the question really is whether or not any substantially new matter has been set up in these cases, additional to that which was before the Supreme Court in the case heard by it, and if so, what is its effect. So far as the relators' case is concerned, it is practically identical with that presented in the case already determined, except that each proceeding is for a different month and a different amount. If there is any difference, therefore, it must be found in the returns.

The first matter set up, not contained in the former return, is that the respondent, as controller, is not bound to countersign a warrant not already signed by the recorder, and that the warrants presented to him were not so signed. It may be that the controller might insist that a warrant duly signed by the recorder should be presented to him before he were called upon to countersign it; but where the refusal to sign was not based upon the absence of the recorder's signature, but for other reasons the respondent refused to sign any warrant, as in this case, it does not seem that the lack of the recorder's signature upon a warrant presented to the controller, or even the lack of the presentation of any warrant to the controller, would, under the circumstances, make any difference. The case seems to be analogous to that of a tender of money, where the refusal to receive any money excuses the production of legal tender.

In the former return it was alleged that the relators owed the city $100 a day under the contract for delay in finishing the work, and that the amount so owing was greater than the sum demanded in that proceeding. This is repeated in the

present return, with the addition that the amount is now $146,000, and that a resolution was pending in council directing that these damages should be retained and enforced. We cannot see any real difference between the two allegations of the returns. If the existence of the penal clause in the contract, and the fact that the amount incurred under it exceeded the amount claimed was not an answer to the former writ, it is none to this. Nor can we see that the resolution in question can alter the relators' rights.

In the return in the former case it was alleged that the work was not done according to the contract, although it was not pointed out in what respects it was not so done. In the present return various particulars are pointed out in which the work done is said to be different from, and inferior to that required by the contract. This, we conceive, however, makes no difference, for if the director of public works is the arbiter, his decision cannot be impeached by declaring him to have made a mistaken or untrue certificate, whether the allegations are general or specific. It is further alleged that the reservoir is now completed, or supposed to be so, and that water has been turned into it, and that it leaks very badly. This also appears to us to be beside the question, as it does not appear by the contract that the relators guaranteed to make a reservoir that should not leak, but only one that should be built according to the plans and specifications. The returns also contain a number of other allegations as to the injury that will be done to the city if the payments demanded are made, but all of them rest upon the allegations as to imperfect work, which in the face of the contract as to the powers of the director, the city and its accounting officer cannot allege against the relator.

The only additional allegations are those which relate to the knowledge of the director of public works that the work done was done in an inferior manner upon a corrupt bargain between the relator and the former incumbent of the office, and other allegations of like import, which together were claimed by the respondent's counsel upon the argument to amount to a charge of fraudulent conduct on the part of the director of public works, such as to render his certificate invalid. In the opinion filed on January 26, 1903, allowing the respondent time to correct and amend his return in this respect, it was pointed

out that in the original return no such fraud was charged, and we need not repeat what was then said. The respondent has since, under the leave so given, filed a correction or amendment to his return, the substance of which is that the director who is alleged to have made a corrupt bargain with the relator is not the same director who issued the estimate, but was one of his predecessors, but that the present director had notice of the corrupt bargain, and that he had notice that the work was done according to it; that a former director had condemned certain work and ordered its removal, but that it has not been removed; and that the present director, before making the estimates, had notice that the work was not done according to plans and specifications, and that the failure so to do it was intentional on the part of the relator, and that the director either knew of the specific defects set out in the return, or was wilfully blind to them. Taking the allegation of the correction or amendment as additional to, and not a substitute for, the original return, and looking at them together, they amount substantially to the allegation that the work was improperly done in certain respects; that the doing of the work in this improper manner by the relator was intentional; that the director had notice of this before he approved the work, but approved it notwithstanding. In other words they say that the decision of the director was erroneous and unjust. As was decided in the case of Hostetter v. The City of Pittsburg, 107 Pa. 419, the fraud for which the decisions of an arbitrator may be attacked must be actual and intentional, and not constructive, or such as flows from an erroneous or unjust judgment; and further that such decisions cannot be "voided unless by proof of fraud practiced on him, or by proof of accident or mistake, by which he was deceived or misled so that in fact the award is not the result of his own judgment." If this were not the law it would be of little avail to refer questions of any sort to arbitrators, as the losing party commonly believes the award against him to be erroneous and unjust, and the arbitrator to have wilfully disregarded what he believes to be established facts.

We are therefore of opinion that nothing has been set up in return to these writs additional to what was set up in the case already decided, which furnishes a reason why the peremptory writs should not be issued.

The demurrers in each of the cases above named are therefore sustained, and it is ordered that judgment be entered for plaintiff and against the defendants in each of the said cases with costs, and that a peremptory mandamus issue in each of said cases as provided by law.

Error assigned was in entering judgment awarding a peremptory mandamus.

George W. Guthrie and *W. B. Rodgers*, for appellant.

William A. Stone and *H. L. Castle*, of *Stone & Stone*, with them *J. A. Langfitt*, for appellee.

Opinion by Mr. Justice Mitchell, May 25, 1903:

These judgments are affirmed on the opinion of the court below.

Mestrezat, J., dissenting.

Aspinall *v.* Viney, Appellant.

Bill of exchange — Presentation — Delay — Negligence — Acceptance of notes — Lunacy.

In an action against the administrator of the drawer of an order, it appeared that the plaintiff did not present the order to the drawees for some weeks, and that when he did so the drawees accepted it, but provided that it should not be paid until after the completion of a certain contract. The drawer wrote to the plaintiff suggesting that he should take notes from the drawee instead of relying upon the acceptance of the order. The plaintiff took the notes, which were never paid. There was evidence that the drawees were in failing circumstances during the whole course of the transaction, but the evidence was not definite as to whether the plaintiff knew this. There was also evidence that the drawer was insane at the time he wrote the letter to the plaintiff, but there was no evidence that plaintiff knew this. The court charged that plaintiff was bound to present the order "in what a prudent business man of reasonable intelligence would say was a reasonable time," and left the question of reasonable time to the jury. *Held*, that the instruction was proper.

Argued April 29, 1903. Appeal, No. 72, Jan. T., 1903, by defendant, from judgment of C. P. No. 4, Phila. Co., March T.,

1899, No. 1325, on verdict for plaintiffs, in case of William Aspinall et al., trading as Aspinall & Hayes, to use of Thomas McCullough, v. Emily W. Viney, Administratrix of William Viney, Deceased. Before MITCHELL, DEAN, FELL, MESTREZAT and POTTER, JJ. Affirmed.

Assumpsit for balance of account. Before WILLSON, J.

At the trial it appeared that William Viney gave to Thomas McCullough an order for $3,000, as follows:

"Bryn Mawr, Pa., June 30, 1898. J. W. Mercur & Company. Please pay to the order of Thomas McCullough the sum of $3,000 and charge the same to my account for stone and brick work, etc., at the Broadway M. E. Church, Camden, New Jersey. Signed, William Viney."

Mercur & Company accepted the order, but stipulated that it should not be paid "until after the completion of the contract." On July 29, 1898, Viney wrote to McCullough the following letter:

"Mr. Thomas McCullough—Dear Sir: I write a line to you in regard to the order you hold from me on Mercur & Co. I have been thinking that it might be better if you took a note from them for the amount of the order and deposit it in your bank for collection when it becomes due, and if they did not pay the note, it seems to me it would be better to sue them on the note than the order. I heard yesterday that some of the people doing the work on the asylum are stopping the work on account of not getting paid. Yours truly,

"WILLIAM VINEY."

The order was accepted some time before the above letter was written, but the evidence as to the exact date was not definite. The work on the contract was completed July 25, and in a settlement made about that time between Mercur & Company and Viney, Mercur & Company claimed credit for $3,000, not because they paid the money, but because they had accepted the order. McCullough subsequently accepted notes from Mercur & Company. These notes were never paid. There was evidence that at the time the letter from Viney to McCullough was written Viney was insane. There was no evidence, however, that McCullough knew of this.

The court charged in part as follows:

[I do not know that it could properly be said that a man who received an order of that sort, when he knows nothing to put him on guard, when he knows nothing to indicate that the man on whom the order is given is in precarious financial circumstances, is bound to present it at once.] [5] [He should present it in what a prudent business man, a man of reasonable intelligence, would say was a reasonable time.] [6]

Verdict and judgment for plaintiff for $8,103.57. Defendant appealed.

Errors assigned among others were (5, 6) above instructions, quoting them.

W. Henry Sutton, for appellant.

Avery D. Harrington, for appellee.

Per Curiam, May 25, 1903:

The turning point in the case was whether McCullough's delay in presenting the order for payment, and his acceptance of notes instead of the money when he did present it, amounted to such negligence as should discharge the drawer of the order. This, however, was not a simple question of law as the appellant presents it. The order was not accepted by Mercur & Company for immediate payment, but as Mercur testified not to be paid "until after the completion of the contract." That involved the question of indefinite time. In regard to taking notes instead of insisting on money, the defendant Viney himself suggested that course in the letter of July 29. The case is still further complicated at this point by the claim that Viney was insane when he wrote that letter. The result of all the evidence was practically to eliminate the application of any general rules of law, and reduce the whole controversy to one of fact which was correctly submitted in the instruction that McCullough was bound to present the order "in what a prudent business man, of reasonable intelligence, would say was a reasonable time," and the direction to the jury to determine the question of his negligence by that standard.

Judgment affirmed.

Sargent *v.* Johns, Appellant.

Contracts—Estoppel — Notice — Taking over business of another—Assumption of debts.

Where a person takes over the entire stock of goods of another and publishes or causes to be published a notice to the effect that he has assumed the debts for goods purchased by the previous owner, creditors of the previous owner are entitled to sue such person in their own names, if their claims are within the consideration, or on the principle of an estoppel, if they are led to believe so, and to act upon such belief to their prejudice in reliance on the notice. In such a case no question of the statute of frauds arises, for by the taking of the entire stock a consideration passed to the purchaser, and the creditors though not parties to the contract were parties to the consideration.

Attorneys at law—Witness—Evidence—Confidential communication.

The mere fact that a person is an attorney at law does not render him incompetent to testify as to matters affecting his client, except as to confidential communications.

The mere fact of employment of an attorney is not a confidential or privileged communication.

Argued March 2, 1903. Appeal, No. 17, Jan. T., 1903, by defendant, from judgment of C. P. Adams Co., Jan. T., 1901, No. 70, on verdict for plaintiffs in case of Joseph B. Sargent et al., trading as Sargent & Company, v. S. L. Johns et al., trading as The L. M. Alleman Hardware Company. Before Mitchell, Dean, Brown, Mestrezat and Potter, JJ. Affirmed.

Assumpsit to recover a debt alleged to have been assumed by the defendants. Before Swope, P. J.

At the trial it appeared that the defendants in 1900, purchased from L. M. Alleman the latter's entire stock of goods. Shortly thereafter the following advertisement, prepared by G. J. Benner, Esq., an attorney at law, was published in the Gettysburg Compiler:

"Public notice is hereby given that the undersigned have purchased the entire stock in trade of the general hardware store on Baltimore street, in the borough of Gettysburg, recently owned by L. M. Alleman, consisting of hardware, paints, wall paper, wagons, buggies, carriage repair goods, etc., and that the business of said store will, from this date, be conducted by the

two undersigned as joint owners under the name and title of the L. M. Alleman Hardware Company. The undersigned, in pursuance of the contract of sale, have assumed the payment of all bills for goods purchased in the conduct of said store by L. M. Alleman, the retiring owner, and creditors are notified to promptly present their claims to them, or either of them. All bills for goods to be purchased in further continuance of said business must, before the delivery of the goods, be approved by one of the undersigned, by whom said bills will be paid at maturity or upon the usual terms of credit. The books of account of said L. M. Alleman have been transferred to the undersigned, with whom settlement must be made.

"S. L. Johns. H. N. Gitt."

The circumstances under which this notice was prepared and published are stated in the opinion of the Supreme Court.

Defendants claimed that when they made the purchase from Alleman it was understood that the plaintiff's claim had been paid.

Under objection and exception the court admitted in evidence the newspaper notice above quoted. [1]

When G. J. Benner was on the stand he was asked this question:

Mr. Hersh: Q. Did you prepare a notice for the L. M. Alleman Hardware Company?

Mr. Sheely: Objected to.

Mr. Hersh: We propose to show by the witness on the stand, at the request of L. M. Alleman of the defendant company, he prepared a business notice, and after preparing it telephoned the contents of the notice as prepared to the defendant company; that they were perfectly satisfied with it and instructed him to have it published in the Gettysburg Compiler and Littlestown Independent.

Mr. Sheely. Objected to as being a confidential communication to an attorney by people he represented at the time, and unless the clients waive it—

Mr. Hersh: We will supplement that by saying this was a gratuitous piece of work by the witness on the stand, and not as an attorney.

Mr. Sheely: That will not help the matter at all.

The Witness: I may be able to simplify the matter—

Q. (The Court): Were you his attorney at the time? A. Not at that time; and my sole conversations in relation to the preparation of that notice were with Mr. Alleman personally, and Mr. Johns and, I think possibly Mr. Brady, who is his confidential agent. I had no personal conversation with Mr. Johns and Gitt. Mr. Alleman came to me and instructed me to do certain work. At that time Mr. Sheely was not in town and, I presumed at that time, if Mr. Sheely had been here Mr. Alleman would not have been in the office, and I had intended to ask these gentlemen how far they regarded this as a privileged communciation. I had no conversation with either Johns, Gitt or Alleman about the preparation of this notice until some months after that, long after it had appeared in the papers, when I was consulted by one of them with reference to this suit.

The Court: It seems from the cross-examination that the defendants were acquainted with this notice. We think we will allow this testimony to be admitted under the circumstances.

Q. (The Court): Did you consider yourself acting at the time for them. A. I did not; I regarded myself as acting in a purely clerical capacity for Mr. Alleman. And I conferred with the principal parties and went on with the preparation purely and solely, as I regarded it, on account of the absence of Mr. Sheely from town.

Mr. McSherry: This offer is objected to, first, for the reason that Mr. Benner, the witness, was a stranger to this transaction and that Gitt and Johns cannot be bound by his act. Second, for the reason that if he was not a stranger, but was acting as counsel for Mr. Alleman, for Mr. Johns or Mr. Gitt, he cannot testify, it being in the nature of a professional engagement.

The Court: Just restate your offer.

Mr. Hersh: We propose to show by the witness on the stand that at the request of L. M. Alleman, the original owner of the store, he prepared the business notice, a copy of which is now in evidence, and after its preparation, conferred or spoke to the defendant company and that they "O. K.'d" it.

The Court: Who is the defendant?

Mr. Hersh: S. L. Johns and H. N. Gitt, the L. M. Alleman Hardware Company; and that they asked him to have it put in the papers.

Mr. McSherry: Objected to, that the employment of Mr. Benner by L. M. Alleman cannot be binding upon the defendants in this suit and that the testimony is illegal and incompetent.

Mr. Sheely: The testimony is further objected to for the reason that Mr. Benner, the witness on the stand, is an attorney at law practising at this court, and that he ought not to be allowed to testify to anything which he did in this matter, whether he acted for Mr. Alleman, or Mr. Gitt, or Mr. Johns, whatever was said to him having been privileged.

The Court: The court taking the employment of Mr. Benner to be largely in the capacity of a scrivener and at the instance of L. M. Alleman, the grantor in the sale of this store, we think the offer is admissible. Exception for the defendant and bill sealed. [2]

The court charged in part as follows:

[The plaintiffs seek to recover the amount of their claim from the defendant firm because, as they allege, the defendant firm, in July or August, 1900, bought all the goods, wares and merchandise of the L. M. Alleman store, and assumed to pay all his indebtedness; that L. M. Alleman was then indebted to them for goods sold him, the said Alleman, in the sum of $3,035, with interest from April 4, 1900, and that none of this claim has ever been paid them, the plaintiff company.

Gentleman, if there were nothing more in this case than these allegations, and they were sustained by proof, the plaintiff company would not only be properly in this court suing the defendant firm in their own name, but they would be entitled at your hands to a verdict for the full amount of their claim.] [9]

[The plaintiffs also claim, gentlemen, that they have shown by proof that they relied and acted on the truth of the advertised notice of sale by Alleman to the defendant company, and the assumption by the defendant company of the debts of Alleman in the purchase of the goods bought by him, and thus changed their relation as a creditor of Alleman to their injury.

Now, gentleman, if you believe the above allegation to be established by proof in this case, then we instruct you that, independent of what the contract of sale was, the defendant would be estopped from showing a different contract in the purchase of the Alleman store than what they gave public notice that it was.] [11]

Estoppels, gentlemen, signify that a man, for the sake of good faith and fair dealing, should be prevented from saying that to be false which by his means has once been accredited as the truth, and by his representations has led others to act.

When one by his words or conduct causes a reasonable man to believe in the existence of a certain state of things, and induces him to act on that belief to his injury, or to alter his own previous position for the worse, the former is estopped from averring against the latter a different state of things as existing at the same time.

A man is not permitted to charge the consequences of his own fault on others, and to complain of that which he himself has brought about.

The defendants, gentlemen, we understand are not denying that at the time of purchase by them of the Alleman store, Mr. Alleman was indebted to the plaintiff firm in the sum of $3,035, with interest from April 4, 1900, and that this claim is unpaid.

But the defendants claim they have shown by the proof in this case that they did not assume or agree to pay the plaintiff's claim in the purchase of the store of Mr. Alleman; that they refused to buy the store until Mr. Alleman produced a receipt showing that certain claims, including the plaintiff's claim, were provided for. Also that they did not authorize the printed notice of the sale as it appeared in the Gettysburg Compiler; that it did not represent the contract of sale truly; that the plaintiff company did not rely on the truth of said advertised notice to their injury, or change their previous relations to Mr. Alleman as their debtor by reason of it.

Now, gentlemen, if you believe all the above allegations of the defendants to be established by proof in this case, then your verdict should be for the defendants. You will, therefore determine, gentlemen, from all the evidence in the case,

1. What the contract for the purchase of the Alleman store

by the defendant company was; did the defendant company assume the payment of the plaintiff's claim, or did they not?

2. Was the advertised notice of this sale published with the approval or assent of the defendant company, with the approval or assent of either Mr. Johns or Mr. Gitt, of the defendant company?

3. Did the plaintiff company, relying on the truth of the advertised notice, change their relation as a creditor of Mr. Alleman to their injury, or for the worse?

[If you find the contract of purchase of the Alleman store by the defendant company included an assumption of the plaintiff's claim against Alleman by the defendant company, then your verdict should be for the plaintiffs for the full amount of their claim.] [12]

[If you find the purchase of said store by the defendant company did not include the assumption or payment by the defendant company of the plaintiff's claim against Alleman, then your verdict should still be for the plaintiffs, provided you also find that the advertised notice of the sale was published, or remained in the paper, with the assent or approval of either Mr. Johns or Mr. Gitt, of the defendant company, and that the plaintiff company, relying on the truth of said notice, changed their relation as a creditor of Mr. Alleman to their injury.] [13]

If you find the contract of sale of the Alleman store to the defendant company did not include the assumption or payment of the plaintiff's claim against said Alleman, then your verdict should be for the defendants, unless you find that the advertised notice of sale was published with the approval or assent of either Mr. Johns or Mr. Gitt, of the defendant company, and the plaintiff company, relying on the truth of said notice, changed their relation as a creditor of Alleman to their injury.

Verdict and judgment for plaintiffs for $3,329.27. Defendants appealed.

Errors assigned were (1, 2) rulings on evidence, quoting the bill of exceptions; (9, 11, 12, 13) above instructions, quoting them.

Robert Snodgrass and *William McSherry*, with them *W. C. Sheely*, for appellants.—Mr. Benner was incompetent as a wit-

ness, by reason of his professional relations to the transactions which gave rise to the alleged contract: Jeanes v. Fridenberg, 3 Clark, 199; Beeson v. Beeson, 9 Pa. 279; Moore v. Bray, 10 Pa. 519; Miller v. Weeks, 22 Pa. 89; Kaut v. Kessler, 114 Pa. 603.

When the plaintiffs, by their agent and attorney, called upon Gitt with reference to the notice, and showed it to him, they were substantially informed that no such notice had ever been authorized by the defendants or either of them. This was practically a withdrawal of the representation, whatever it may have been, and no matter what the plaintiffs afterwards did, it would not constitute an estoppel on their behalf, since by following the inquiry suggested by this interview they could easily and quickly have ascertained the facts.

Wm. Arch McClean, with him *Wm. McClean* and *Wm. Hersh*, for appellee.—Mr. Benner was a competent witness: Levers v. Van Buskirk, 4 Pa. 316; Beeson v. Beeson, 9 Pa. 279; Heaton v. Findlay, 12 Pa. 304; Goodwin Co.'s Appeal, 117 Pa. 514; Caldwell v. Davis, 10 Colo. 481 (15 Pac. Repr. 696); DeWolf v. Strader, 26 Ill. 225; Smith v. Long, 106 Ill. 485.

Defendants were estopped from denying business notice: Eldred v. Hazlett, 33 Pa. 307; State v. Pepper, 31 Ind. 76; Com. v. Moltz, 10 Pa. 527; Hill v. Epley, 31 Pa. 331; Stanley v. Whipple, 2 McLean, 35; Hostler v. Hays, 3 Cal. 302; Lewis v. Carstairs, 6 Whart. 193; Graff v. Pittsburg, etc., R. R. Co., 31 Pa. 489.

Opinion by Mr. Justice Mitchell, June 2, 1903:

There were two general grounds on which the defendants were claimed to be liable, first the actual assumption by them of the plaintiff's claim against Alleman, and secondly an estoppel to deny such assumption by the published notice to Alleman's creditors.

The first claim raised a question of fact which was properly left to the jury. Under the testimony it could not have been withdrawn from them.

The second question depends chiefly on the published advertisement in the names of the defendants of their purchase of the Alleman store, their taking possession of the entire stock,

and their assumption of Alleman's liabilities for goods purchased in that business. No question of the statute of frauds arises, for by the taking of the entire stock a consideration passed to defendants and Alleman's creditors, though not parties to the contract, were parties to the consideration within the principles of Delp v. Bartholomay Brewing Company, 123 Pa. 42, and Adams v. Kuehn, 119 Pa. 76. Plaintiffs therefore as such creditors were entitled to sue in their own names if their claims were in fact within the consideration, or on the principle of estoppel if they were led to believe so, and to act upon such belief to their prejudice in reliance on a notice authorized or adopted by the defendants.

There was evidence sufficient to go to the jury that the advertisement was authorized by the defendants. The testimony of Mr. Benner was direct and positive that although he drafted the notice on the request of Alleman, yet in view of the circumstances he thought it best to communicate with the defendants, and did so over the telephone twice with Johns, read the notice to him and received his approval of it. Other evidence was to the same effect in the circumstances of the sending of the bill of sale to him by Johns so that he might get the notice in proper form, the payment for the advertisement by the firm, the failure of Gitt to disclaim when it was shown to him subsequently and demand for payment made by a representative of plaintiffs.

The contention of appellants that Benner's testimony was not admissible cannot be sustained. The fact that he was an attorney at law does not render him incompetent to testify except as to confidential communications, and here there was nothing of the kind shown. Mr. Benner himself testified positively that he was not employed by defendants at all but by Alleman and not even by him in his professional capacity but acted clerically and entirely as matter of friendliness because Alleman's regular counsel was away. There was no relation of client and attorney shown between the defendants and Benner. But even if such relation had been directly and expressly shown Benner's testimony would not have been incompetent. The mere fact of employment of an attorney is not a confidential or privileged communication: Seip's Estate, 163 Pa. 423, 432. There being a difference in the testimony of Alleman

and Benner as to the circumstances of the latter's connection with the notice, the court left the question of the relation of client and attorney to the jury instructing them that if they found such relation existed they should disregard Benner's testimony. This was more favorable to defendants than they were entitled to.

The only remaining question was whether plaintiffs had altered their position in any way to their disadvantage in reliance on the published notice. This was also a question for the jury and was left to them with careful and correct instructions, including the express affirmance of defendants' points that "if the jury believe that the defendants at the time of the purchase of the store from L. M. Alleman purchased the same with the understanding and the belief that the Sargeant claim had been settled or arranged in some other way, and with no intention on their part to assume the same, then the defendants are not liable in this action, unless for some reason the defendants are estopped from alleging the actual contract of purchase," and "if the jury believe that on December 10, 1900, as soon as the notice published in the Gettysburg Compiler was seen by the plaintiff's agent, or brought to the notice of plaintiffs or their agent, and an agent of the plaintiffs called upon the defendants, or either of them, and was at once informed that the notice did not include, and was not intended to include, the payment of the Sargent claim, then the defendants are not estopped from alleging that said claim was excluded in the contract of purchase."

The whole case in all its aspects was submitted to the jury carefully and we find no error of which appellants can complain.

Judgment affirmed.

Ebert *v.* Johns, Appellant.

Contract—Estoppel—Assumption of debts of another—Receipt—Accord and satisfaction.

Where a creditor gives to his debtor a receipt in full for an amount stated which in fact was only a portion of the real claim, and the debtor uses the receipt as a basis for selling his entire stock of goods to a third person, who relying upon the receipt publishes a notice that he has assumed all of the debts of the debtor, the creditor is estopped by reason of the receipt from making any claim against the purchaser of the goods; and it is immaterial that as between the parties to the receipt there was no accord and satisfaction.

The rule that payment of a smaller sum is not a good accord and satisfaction for a larger one applies only between debtor and creditor, and not to third parties.

Argued March 2, 1903. Appeal, No. 18, Jan. T., 1903, by defendants, from judgment of C. P. Adams Co., Jan. T., 1901, No. 71, on verdict for plaintiff in case of Augustus H. Ebert, trading as B. Ebert & Sons, v. S. L. Johns and Harry N. Gitt, trading as the L. M. Alleman Hardware Company. Before MITCHELL, DEAN, BROWN, MESTREZAT and POTTER, JJ. Reversed.

Assumpsit to collect a debt of another alleged to have been assumed by defendants. Before SWOPE, P. J.

The facts appear by the opinion of the Supreme Court, and by the report of Sargent v. Johns, ante, p. 386.

Verdict and judgment for plaintiff for $6,701.70. Defendant appealed.

Error assigned was in refusing binding instructions for defendants.

Robert Snodgrass and *William McSherry*, with them *W. C. Sheely*, for appellants.—Plaintiffs were estopped by their receipt: Robertson v. Hay, 91 Pa. 242; Penna. R. R. Co. v. Shay, 82 Pa. 198.

William Hersh, with him *William* and *William Arch McClean*, and *F. J. Nelson*, for appellees.

Opinion by Mr. Justice Mitchell, June 2, 1903:

This case grows out of the same transaction as that of Sargent et al. v. Johns, ante, p. 386, and most of the questions involved have been discussed and determined in that case. But there is one important feature in which there is a wide difference. In the former case there were two grounds on which the jury were entitled to find the liability of defendants, first that they had in fact assumed the payment of Sargent's claim, and secondly that they had legally assumed it by estoppel after the publication of notice to Alleman's creditors and the latter's change of position in reliance upon it. Neither of these grounds exists in the present case. There is no evidence on which the jury could find that the defendants assumed in fact or intended to assume the payment of Ebert's claim as a part of the consideration in the purchase of Alleman's stock. The whole body of the evidence is to the contrary.

Nor does the publication of the notice in the Gettysburg Compiler to the creditors of Alleman, even conceding as the jury have found that it was by authority of defendants, raise any estoppel in favor of the plaintiff, as a review of the facts will show. Alleman was indebted to many parties, including Ebert, and the latter was pressing for his money. Alleman being unable to pay proposed to sell out to Ebert, but after some negotiation this plan fell through and Alleman then endeavored to obtain a loan from defendants. The latter required a statement of his financial condition and finally agreed to buy his stock if the bulk of his debts, as shown by a prepared list, could be paid or settled. To facilitate this arrangement Ebert signed a paper containing a list of Alleman's creditors, with the amount of their claims on which Ebert receipted for $5,000 "in full satisfaction and payment of all sums of money due us by said Alleman on book account, for money loaned, notes, or in any other way or matter whatsoever.

"I also acknowledge that the aforesaid payment to us made includes the payment of the following bills of goods purchased by said Alleman or by me for said Alleman, and I hereby expressly agree to assume said bills and to pay the same to the holders thereof. . . .

"I also acknowledge that the aforesaid payment includes

the payment by said Alleman of all notes given by said Alleman to us, whether the same have been discounted by us or not, and I hereby expressly agree to take up all of said notes and to deliver the same to said Alleman." In explanation of the inclusion of other creditors it was shown that Ebert was not only a creditor of Alleman for goods sold to him directly, but was also liable to other dealers from whom he had purchased goods for Alleman on the pledge of his own credit.

Armed with this paper, Alleman procured the defendants to purchase his stock and paid over to Ebert $5,000 of the purchase money. This money he got from defendants on the faith of that paper, by which they were led to believe that Ebert's debt was settled and the other claims on the list assumed by him. When, therefore, defendants published the notice to Alleman's creditors they had a right to rely on Ebert's representation that he was no longer a creditor, and he was estopped from setting up any claim against defendants. Sargent & Company and the other creditors who were in ignorance of this arrangement and no parties to it even if they had known of it, were entitled as already discussed in that case, to rely on the notice and as to them defendants were estopped from denying their liability. But no such estoppel arose in favor of Ebert, for he had previously estopped himself by the receipt, signed for the purpose of inducing defendants to advance money either as loan or purchase, and the purchase by defendants on the faith of that receipt.

The learned judge below in a general way took this view, but left it to the jury always with the qualification "provided the jury find that in the purchase of the store, by agreement between defendant company and Alleman, the defendant company did not assume the payment of the plaintiff's claim." But there was no evidence on which the jury could be permitted to so find. The execution of the paper by plaintiff and the use of it by Alleman as the basis of the sale to defendants were not denied, and the estoppel of the plaintiff should have been ruled by the court as a matter of law on the undisputed facts.

All the plaintiff's points on the estoppel of defendants by the published notice were for the foregoing reasons entirely irrelevant and should have been refused.

All the points in regard to accord and satisfaction were also irrelevant and should have been refused. Whether the receipt of $5,000 by Ebert as in full for an indebtedness said to have been four times that amount was a good accord and satisfaction between him and Alleman was immaterial. It was said that it was a payment of part of the debt before it was due, and therefore valid. But, however the facts may be as to that, the point had no relevancy to this case. The rule that payment of a smaller sum is not a good accord and satisfaction for a larger one applies only between debtor and creditor. It was a deduction of strict scholastic logic in the days when money was regarded as having a fixed and unchangeable value. Hence a part payment of money due could never logically be treated even by agreement as equivalent to a payment of the whole. In the business methods of the present it has come to be recognized that money like other commodities has fluctuations of value not only in the general market, but also and more especially to the individual. To a merchant with a note coming due $5,000 before three o'clock to-day, which will save his commercial credit, may well be worth more than $20,000 to-morrow after his note has gone to protest. The recognition of this business condition has led to a statutory change of the rule in some states: 1 Am. & Eng. Ency. of Law, tit. Accord (2d ed.), p. 414. But the rule was always regarded as more logical than just, and as coming very close to a contradiction of the general rule that the law will not measure the amount or value of the consideration if parties have agreed upon it. Hence any circumstance of variation such as payment at a different place or before the debt is due has been held sufficient to take a case out of the rule. But the rule itself never had any application to a payment by a third party, and that was the case here. The $5,000 paid by Alleman to plaintiff was furnished by defendants in consideration of the receipt which plaintiff signed for that purpose. As between these parties it was a valid consideration and raised the estoppel already discussed.

Judgment reversed.

Seifred *v.* Pennsylvania Railroad Company, Appellant.

Appeals—Assignments of error—Practice, Supreme Court.

It is improper practice on appeal to raise the same question by several different assignments of error.

Negligence—Evidence—Opinion of witnesses—Grade crossing.

In an action against a railroad company to recover damages for personal injuries sustained at a grade crossing it is error to admit the opinion of witnesses to show that the crossing was dangerous, where the facts disclosed by the evidence give an intelligent description of the situation. In such a case the jury have before them all that is necessary to enable them to form an opinion themselves as to the character of the crossing.

Negligence—Railroads—Grade crossing—Duty as to flagman.

On running its trains over a crossing, a railroad company must exercise the care required by all the circumstances, and the failure to perform this duty is negligence. It must adopt and use some means for the protection of those who may be crossing its tracks at their intersection with a public highway. But what particular means shall be used to protect the public when using the crossing with due care is left to the railroad company which operates the road, the law merely demanding and requiring reasonable care in view of all the circumstances.

It is not negligence per se for a railroad company not to guard a crossing with a flagman or watchman. It is only one of the elements to be considered with others in determining whether the company is negligent.

Negligence—Damages—Carlisle tables.

In an accident case where the Carlisle tables are admitted to show the expectancy of life of the plaintiff, the court must carefully guard the effect of the evidence by directing the attention of the jury to the circumstances affecting the duration of the life in question. It is not sufficient to say that the tables are some aid, but not conclusive in determining the probable life of the plaintiff. All the circumstances affecting the probable duration of the plaintiff's life as disclosed by the evidence or concerning which there is testimony, should be called to the attention of the jury.

Negligence—Railroads—"Stop, look and listen"—Grade crossing.

In an action against a railroad company to recover damages for personal injuries sustained while plaintiff was driving over a grade crossing, the plaintiff testified that he stopped at a point between sixty and seventy feet from the track, and that this point "was the best place I could get to look through." The view eastward from which the train approached was somewhat obstructed, but he said that at that point there was an open space of sixty feet through which he could see in an easterly direction the railroad tracks. He testified, "I looked out through

there, and there was nothing to be seen ahead of me, and I thought I could drive across." He had passed safely over two tracks and his horse went beyond the third track when his vehicle was struck and he was injured. *Held* that the question of plaintiff's contributory negligence was for the jury.

Practice, C. P.—Points for charge—Several propositions.

A point for charge containing several propositions of law, some good, and others clearly not, is properly refused. A point should contain but a single legal proposition and be so constructed that the trial court can answer it by a simple affirmation or negation.

Argued May 11, 1903. Appeal, No. 268, Jan. T., 1902, by defendant, from judgment of C. P. Snyder Co., June T., 1901, No. 106, on verdict for plaintiff in case of William P. Seifred v. Pennsylvania Railroad Company. Before MITCHELL, DEAN, FELL, BROWN and MESTREZAT, JJ. Reversed.

Trespass to recover damages for personal injuries. Before McCLURE, P. J.

The opinion of the Supreme Court sufficiently states the case.

Verdict and judgment for plaintiff for $5,433. Defendant appealed.

Errors assigned were various rulings on evidence and various instructions.

Andrew A. Leiser, for appellant.—Opinions are never received if all the facts can be ascertained and made intelligible to the jury, or if they are such as men in general are capable of comprehending and understanding: Graham v. Pa. Co., 139 Pa. 149; Woeckner v. Motor Co., 187 Pa. 206; King v. Missouri Pacific Ry. Co., 98 Mo. 235 (11 S. W. Repr. 563); Closser v. Washington Twp., 11 Pa. Superior Ct. 112; McNerney v. Reading City, 150 Pa. 611-616; Dooner v. Canal Co., 164 Pa. 17; Platz v. McKean Twp., 178 Pa. 601; Cookson v. Ry. Co., 179 Pa. 184; and it is reaffirmed and emphasized in Auberle v. McKeesport, 179 Pa. 321.

Absence of gates and flagman is not per se negligence: Collins v. Leafly, 124 Pa. 203; Phila. & Reading R. R. Co. v. Killips, 88 Pa. 405.

The instructions as to the life tables were insufficient: Stein-

brunner v. Pittsburg, etc., Ry. Co., 146 Pa. 504; Campbell v. York, 172 Pa. 205; Kerrigan v. Penna. R. R. Co., 194 Pa. 98; McKenna v. Citizens' Nat. Gas Co., 198 Pa. 31.

Plaintiff was guilty of contributory negligence: Marland v. R. R. Co., 123 Pa. 487; Moore v. P. W. & B. R. R. Co., 108 Pa. 349; Penna. R. R. Co. v. Bell, 122 Pa. 58.

C. P. Ulrich and *A. W. Potter*, for appellee.

Opinion by Mr. Justice Mestrezat, June 2, 1903:

It is not the number of exceptions taken during the trial nor the number of assignments of error filed in this court that determines the importance of the cause or the merits of the appeal when the case reaches the appellate court. This suggestion has been made so often by this court that its repetition would seem useless were it not that occasionally counsel still seem to think it necessary to raise the same question by several different assignments of error. Here we have seven assignments which raise but the single question of the competency of a witness to express an opinion as to the dangerous character of the crossing where the accident occurred. A like observation may be made as to the other assignments, and it is safe to say that of the thirty assignments of error filed in this case, one fifth of the number would have been adequate to raise all the questions presented by this record for our consideration. We make these suggestions with the hope that we may be relieved from an examination of an unnecessarily voluminous record, such as we have before us, should the next trial of this cause be followed by an appeal.

We think it was error to admit the opinion of witnesses to show that the crossing where the collision occurred was dangerous. The competency of such testimony is based upon necessity. Where facts disclosed by the evidence give an adequate and intelligent description of the situation, opinion evidence is not admissible. Here there can be no difficulty in placing before the jury by proper evidence the exact situation of the crossing and its approaches so that the jury will be enabled to determine with equal correctness as the witness the character of the crossing. The testimony produced on the trial shows the number of tracks, the manner in which they cross the

highway, the frequency with which and the purpose for which they were used by the railroad, the cars standing on the track at the time of the accident, the buildings, trees, etc., along the approaches which obstruct the view of an approaching train; in a word, every fact which a juror could know by personal inspection of the premises and which would qualify him to testify as a witness. The jury therefore would have the same information and knowledge of the situation and be as competent and capable of forming an opinion as to the dangerous character of the crossing as any witness who might be called to the stand. No special knowledge or training was necessary to qualify a witness or juror to determine whether the crossing was dangerous or not, and a full and adequate description of the circumstances and situation having been given by the witnesses there was no necessity for opinion evidence on the subject and its admission was error.

The learned trial judge charged, inter alia, as follows: "If this crossing was not a more than ordinarily dangerous crossing, then the sounding of the bell and blowing of the whistle was sufficient notice, and the company would not be to blame for not having a watchman or flagman at that point; and if the whistle was blown and the bell was rung as the engine approached the crossing, they have done their full duty at this point, if you find in addition that it was not a dangerous crossing." This was clearly misleading and erroneous and was not cured by any other part of the charge. In effect, the court said to the jury, if the crossing was dangerous it was negligence per se for the company not to guard it with a flagman or watchman. As suggested by counsel, all railroad crossings are more or less dangerous and are so regarded. The jury therefore was told by the court that the failure to furnish a flagman or watchman at the place of the accident was negligence. The learned judge may not have intended to say this to the jury but such was clearly the effect of that part of the charge just quoted. On running its trains over a crossing, a railroad company must exercise the care required by all the circumstances, and the failure to perform this duty is negligence. It must adopt and use some means for the protection of those who may be crossing its tracks at their intersection with a public highway. But what particular means shall be used to protect the public

when using the crossing with due care is left to the railroad company which operates the road, the law merely demanding and requiring reasonable care in view of all the circumstances. Says CLARK, J., in Lehigh Valley Railroad Company v. Brandtmaier, 113 Pa. 610: "The law does not designate the mode in which these precautions against injury on part of the company (at crossings) are to be exercised; there is, it may be conceded, no common-law duty on part of the company to station flagmen, or to maintain gates, at public grade crossings, unless indeed, under the particular circumstances, the public safety cannot otherwise be reasonably secured; but the fact that flagmen are not stationed at such a crossing, and that gates are not there maintained, are matters proper to be considered, with other facts, in a given case, in determining the rate of speed which is reasonably consistent with the public safety." The twelfth and thirteenth assignments of error must be sustained.

From the charge and his answer to points we are satisfied that the learned trial judge intended to instruct the jury that compensation was the measure of damages. Some of the language used in the charge on the subject may be open to criticism but if so, on another trial, this fault may be avoided. The rule as to the measure of damages in cases of this character is so well established by a long line of decisions that it need not be repeated here.

Having admitted the Carlisle tables to show the expectancy of life of the plaintiff, the learned trial judge should have more carefully guarded the effect of the evidence by directing the attention of the jury to the circumstances affecting the duration of the life in question. As said in Steinbrunner v. Pittsburg, etc., Railway Company, 146 Pa. 504: "Their value, where applied to a particular case, will depend very much upon other matters, such as the state of health of the person, his habits of life, his social surroundings, and other circumstances which might be mentioned." It is not sufficient to say, as the court did, that the tables were some aid but not conclusive in determining the probable life of the plaintiff. All the circumstances affecting the probable duration of the plaintiff's life as disclosed by the evidence or concerning which there was testimony, should have been called to the attention of the jury. Unless

this is done, and in a very pointed and direct way by the court, mortality tables are very likely to have more weight with the jury than should be given evidence of that character.

Under the evidence, the plaintiff's negligence, like that of the defendant's, was a question for the jury. He did not drive recklessly nor carelessly in front of a moving locomotive, if his evidence is believed. Carroll v. Penna. R. R. Co., 12 W. N. C. 348, and kindred cases therefore are not applicable to the facts disclosed by the evidence in this case. The jury would have been justified in finding that the plaintiff did what the law exacted of him and stopped, looked and listened for an approaching train before he attempted to cross the defendant company's tracks. He testified that the point at which he stopped was between sixty and seventy feet from the track and "was the best place I could get to look through." The view eastward from which the train approached was somewhat obstructed, but he says that at that point there was an open space of sixty feet through which he could see in an easterly direction the railroad tracks. "I looked out through there" he says, "and there was nothing to be seen ahead of me, and I thought I could drive across." He had passed safely over two tracks and his horse was beyond the third track when his vehicle was struck and he was injured. The facts thus disclosed were sufficient to send the case to the jury on the question of the plaintiff's negligence. It was argued by counsel for the appellant that it "is conclusively shown by the fact of the collision itself and by the testimony of disinterested eyewitnesses that Seifred did not, in truth, stop at all;" and the appellant's testimony to sustain the argument is quoted at length in the printed belief. But this argument, like the testimony, was for the jury and not for this court. There was testimony introduced by the plaintiff, if believed, to warrant a finding that he did stop, look and listen at a place where he could see an approaching train. The fact that the view in the direction in which he looked was not entirely unobstructed does not convict him of stopping in the wrong place. There he could see, and it was his duty to stop at that point and to use the opportunity thus given him to prevent a collision by looking and listening for an approaching train. This he did.

The defendant's counsel embodied in some of his requests

for instruction several propositions of law, some good and others clearly not. The learned trial judge was therefore right in refusing them. A point should contain but a single legal proposition and be so constructed that the trial court can answer it by a simple affirmation or negation.

Such matters as inadvertently crept into the case during the trial and are complained of here will doubtless not appear in the next trial and need not receive any special attention at this time.

The judgment of the court below is reversed and a venire facias de novo is awarded.

Minnich's Estate.

Trusts and trustees—Spendthrift trust—Active trust.

A gift of an estate to a trustee to invest the same in real estate or otherwise, and if in real estate to permit the son of the testatrix to occupy it, and to pay taxes and repairs if the son fails to do so, and with the express direction that the income was "not to be in anywise liable for any debts owing by my said son, nor for any debts that may be hereafter contracted by him," is a valid spendthrift trust to be held by the trustee, although there was no devise over of the corpus of the estate after the son's death.

Argued May 18, 1903. Appeal, No. 282, Jan. T., 1902, by Jacob O. Minnich, from decree of O. C. Lancaster Co., May T., 1902, No. 25, dismissing exceptions to adjudication in estate of Anna Minnich, deceased. Before Mitchell, Dean, Fell, Brown and Potter, JJ. Affirmed.

Exceptions to adjudication. Before Smith, P. J.

At the audit Jacob O. Minnich claimed his share of his mother's estate divested of any trust. The material portion of the will of the testatrix was as follows:

"The part or share coming to my son Jacob O. Minnich. I give and bequeath to my brother Abraham B. Oberholtzer, of Lebanon County, Pa., in trust for the use and benefit of my said son Jacob O. Minnich, said trustee to invest the funds at interest at his discretion, either in real estate or otherwise and

pay to my said son the interest thereof as often as it may accrue, and if invested in real estate to give him the income or occupation of same, providing he pays all taxes upon it and keeps the same in reasonable repair from time to time during the term of his life, and in case of neglect said trustee shall pay the taxes and make the necessary repairs, and deduct from his annual income the amount so expended, and pay annually to him the balance; and if invested at interest, said trustee shall pay the annual state tax on the same, and deduct it from the income, and the same is not to be in anywise liable for any debts owing by my said son, nor for any debts that may be hereafter contracted by him."

The court awarded the fund to the trustee.

Exceptions to the adjudication were dismissed by the court.

Error assigned was in dismissing exceptions to auditor's report.

I. C. Arnold, with him *J. H. Light*, for appellant.

O. P. Bricker, for appellee.

PER CURIAM, June 2, 1903:

The testatrix, it is true, as appellant claims, left him the entire net income of his share of her estate, without any devise over of the corpus after his death. But she put it in the hands of a trustee with active duties to perform in the payment of taxes and repairs if the devisee failed to do so, and with the express direction that "the same is not to be in anywise liable for any debts owing by my said son, nor for any debts that may be hereafter contracted by him." This was a valid spendthrift trust which could not be allowed to be defeated by handing over the corpus of the estate to the control of the cestui que trust.

Decree affirmed at costs of appellant.

Svenson, Appellant, *v.* Rohrer.

Deed—Reconveyance—Time—Agreement as to time—Time as essence of contract.

Where an agreement on its face shows that it was for a reconveyance of property originally conveyed as security for the payment of money, and the agreement specifies a time for the reconveyance, but the parties subsequently agree upon another and later time, the date then fixed becomes of the essence of the agreement, and if the party desiring the reconveyance does not tender the money on the date, and does not file a bill for a reconveyance until four months thereafter, the bill will be dismissed.

Argued May 19, 1903. Appeal, No. 103, Jan. T., 1903, by plaintiff, from decree of C. P. Lancaster Co., Equity Docket No. 4, page 19, dismissing bill in equity in case of Mary C. Svenson v. Howard Rohrer. Before MITCHELL, DEAN, FELL, BROWN and POTTER, JJ. Affirmed.

Bill in equity for reconveyance of real estate.

LANDIS, P. J., found facts as follows:

FINDINGS OF FACT

The plaintiff resides in the county of Lancaster, and the defendant in the city of Lancaster, and both of them have there resided for a number of years. The plaintiff was the owner of a tract of land, situated in Providence township, containing thirty-four acres and ninety-seven perches, and upon it is erected a tavern property, which is licensed to sell liquor by the court of quarter sessions. She obtained her title through a purchase at sheriff's sale, held on January 18, 1902, and her deed is dated January 31, 1902. The consideration named therein is $1,400. The said property belonged to the estate of Frederick Schmook, deceased, and it was sold under a judgment to October term, 1901, No. 51, in which Mary C. Markley was the plaintiff, and Frederick W. Schmook, Gertrude Schmook, Mary Svenson, George A. Schmook and Henry Schmook were the defendants. Simultaneously with her deed being executed and delivered, she conveyed the property to Howard Rohrer, and he then immediately executed the following paper:

"January 31, 1902.

"I, Howard Rohrer, hereby agree to convey to Mary C. Svenson the property this day convey by her to me. I am to convey the same to her on April 1, 1902, on payment to me of the sum of fifteen hundred and three dollars by said Mary C. Svenson.

"HOWARD ROHRER."

"Witness: A. B. HASSLER.

Mrs. Svenson, at the same time, paid $14.00 as interest on the money to April 1, 1902.

When this paper was executed, Mrs. Svenson admits it was read to her, and she fully knew its contents; but she now relies upon another agreement, whereby Rohrer agreed to wait another year, if she did not have the money on April 1, 1902. This latter agreement, she says, was first made in the morning before the signing of the written agreement. There is no testimony on the part of any one but herself concerning it. It was also mentioned and agreed upon, according to the testimony of herself, and that of B. F. Rowe, in the afternoon, after the deed and written agreement were executed and delivered. As Rohrer denies that any agreement, except the written one, was ever entered into, it is oath against oath, so far as the alleged morning agreement is concerned, and, therefore, the writing must govern; and, as to the alleged agreement made in the afternoon, after the deed and written agreement were signed and delivered, it is wholly without consideration, and, therefore, unsupportable. We, therefore, find as a fact that the written agreement, signed by Howard Rohrer, and delivered to Mrs. Svenson, was the true agreement of the parties, and by it they must each stand or fall: School Furniture Co. v. Warsaw School District, 130 Pa. 76.

Mrs. Svenson had purchased this property at sheriff's sale for $1.400, and had difficulty in raising the money to pay for it. Rohrer, therefore, agreed that, if she would allow him $100 for his trouble, he would raise the money for her. This he did, and the $1,503, mentioned in the writing, was made up of $1,400, the amount of her bid at the sheriff's sale, $3.00 for the sheriff's deed, and $100, compensation for Rohrer.

Possession was never given by Rohrer to Mrs. Svenson, but

about March 17, he agreed with Rowe that he might go into the premises temporarily—no definite time being fixed—the license having been granted to Rowe. Rohrer furnished the money necessary to lift it. Mrs. Svenson was either living on the property at the time, or moved into it about April 1. She now says she leased to Rowe on February 17; but, as she at that time had no deed, and not even the right of possession to the property, she could not lawfully make a lease for it. When April 1 arrived, she did not pay or offer to pay the amount stipulated in the agreement, and, on April 10, Rohrer went down to see what she proposed to do about it. She asked him to hold off until the following Monday, and he agreed to do so. He waited until the next Wednesday, and then placed his deed on record. On May 9, she came to town, and, in company with Louis N. Spencer, Esq., called upon him. She had been endeavoring to negotiate a loan for the amount, and Mr. Spencer had a client, who had the money, if the security was satisfactory. She had promised to give him a mortgage on this property, and other security besides, and, from his inquiries, Mr. Spencer had concluded that it, if as represented, would be a good loan, but he made no investigations, and never definitely promised her the money. He came across, or was told of, the Rohrer deed, and it was because of this, they made their call upon Mr. Rohrer on that day. They made no tender of the money at that time, nor did they even offer to pay it, but Mr. Rohrer did not state to them that the property was his and he was going to keep it. In the month of June, however, Rohrer offered to convey the property to her, if she would pay the expenses, but this she would not agree to do.

In order to run a hotel, it was, of course, necessary to have stock. Rowe and Mrs. Svenson, therefore, came together to the liquor store kept by Mr. Rohrer and his father, and purchased liquors to the amount of about $149. He paid $15.00 on account, leaving $134 due. On August 4 another attempt was made to effect a settlement, the parties both having counsel acting for them at that time. It was agreed that, if Mrs. Svenson would pay the amount of the claim, the balance of the liquor bill and all costs incident to it, and Mr. Rohrer's attorney, so that he might not be at any expense through the transaction, he would make a deed to Mrs. Svenson. She was to

have until the following Friday to pay the money; but she never saw Rohrer afterwards, and he had no communication with her up to the time of the filing of this bill. There is no evidence before us that the defendant endeavored to sell the property to any one else before this bill was filed, except Mrs. Svenson's statement that he told her "there was a couple of fellows dickering at it, and in a couple of days" he "would get word whether they will buy it or not."

The court entered a decree dismissing the bill. Plaintiff appealed.

Error assigned was decree dismissing the bill.

B. F. Davis, for appellant.

A. B. Hassler, for appellee.

PER CURIAM, June 2, 1903:

The agreement between the parties as appears from its face is for a reconveyance of property conveyed by plaintiff to defendant as security for the payment of money. Under such contracts time though specified is not regarded in equity as of the essence. We pass by as unnecessary to consider in the present case, the effect of the act of 1881. But even in equity the pledgee is not bound to wait indefinitely and may call upon the pledgor to redeem in a reasonable time. What is a reasonable time may be fixed by the parties or by a court of equity. In the present case the parties agreed upon an extension of the time to a given date, and whatever their respective rights may have been previously, the date fixed then became of the essence of the agreement and plaintiff was bound by it. She did not tender the money on the date, and her bill was not filed until more than four months later. The court held that it was too late and we are not convinced that he erred in so doing.

Decree affirmed.

Geist *v.* Rapp, Appellant.

Negligence—Master and servant—Scaffolding.

In an action against an employer to recover damages for the death of an employee by the fall of a scaffolding on which the deceased worked, there was testimony that the scaffold was built in an unusual manner with insufficient planks and insufficient nails, and that for that reason it was not capable of bearing safely the weight that would be put upon it. The evidence of experienced carpenters was conflicting as to whether the defective construction was so manifest that the deceased should have seen it. *Held*, that the case was for the jury.

Evidence—Model—Negligence.

In an accident case a model of a scaffold not put in evidence nor treated as such, may be used for illustration of the description by a witness of the mode of building the scaffold.

Trial—Jury—Relationship between jury and party—New trial.

The appellate court will not review the action of the trial court in refusing a new trial asked for on the ground of an alleged relationship between a party and a juror, where the court below has found upon apparently sufficient evidence that no such relationship actually existed between the parties.

Argued May 19, 1903. Appeal, No. 84, Jan. T., 1903, by defendant, from judgment of C. P. Lancaster Co., Dec. T., 1900, No. 18, on verdict for plaintiff in case of Mollie Geist et al. v. Dionysius H. Rapp. Before MITCHELL, DEAN, FELL, BROWN and POTTER, JJ. Affirmed.

Trespass to recover damages for death of plaintiff's husband.

At the trial it appeared that Abram Geist was killed in July, 1900, by the fall of a scaffolding on a new building in construction at the Millersville State Normal School for which the defendant was contractor. Plaintiff introduced evidence which tended to show that the scaffolding was erected in an unusual manner and with insufficient material. The evidence as to whether the defects were so manifest that the deceased should have known them, was conflicting. The court submitted the case to the jury.

Verdict and judgment for plaintiff for $3,300. Defendant appealed.

Errors assigned were (1) in submitting the case to the jury; (2) answer to defendant's third point referred to in the opinion of the Supreme Court; (3) in permitting exhibition of model also referred to in the opinion of the Supreme Court; (4) in refusing a new trial for reason stated in the opinion of the Supreme Court.

John A. Coyle, of *Coyle & Keller*, with him *William R. Brinton*, for appellant.

W. U. Hensel, with him *E. D. Reilly*, for appellee.

Per Curiam, June 2, 1903:

There was testimony that the scaffold was erected in an unusual manner, with insufficient planks and insufficient nails, and that for that reason it was not capable of bearing safely the weight that would be put upon it. If the jury believed this evidence the cause of the accident was shown, and it was clearly a question for the jury.

So also whether the defective construction was so manifest that the plaintiff's decedent should have seen it, and his not doing so, or his use of the scaffold in disregard of its faulty construction was contributory negligence on his part, was for the jury. Where witnesses who were experienced carpenters differed on that question, the court certainly could not determine it as a matter of law.

The defendant's third point that if an employee is injured by the negligence of a fellow employee the employer is not responsible, was affirmed by the judge with the addition that the employer is responsible for the acts of a vice principal, but that Asper, the workman who built the scaffold, in this case was not a vice principal. Taken by itself this addition seems somewhat irrelevant and is assigned for error on that account. But even if so it could not have done any harm to appellant, and its relevancy is clearly shown by the learned judge in his opinion refusing a new trial. "It had been suggested by counsel for the plaintiff that Asper was a vice principal, and so that the jury might thoroughly understand the law of the case, we not only told them that the proposition contained in the point was correct, but also, that, while an employer was responsible for the acts of the vice principal, Asper was not a

vice principal, but a fellow workman with Geist, and that his negligence, as such, if the building of the scaffold was entirely entrusted to him, would not render Rapp liable." So explained, the answer was not only relevant, but more favorable to appellant than the bare affirmation of his point would have been.

The assignment of error to the use of the model cannot be sustained. The model was not put in evidence nor treated as such, but merely used for illustration of the description by the witness of the mode of building the scaffold. The witness might have put the boards together in the presence of the jury by way of illustration as part of his testimony, or counsel might have done the same thing as part of his argument: Hagan v. Carr, 198 Pa. 606. The appellant had and exercised the same privilege as part of his side of the case.

The assignment of error that "the court erred in refusing to grant the defendant a new trial for the following reasons: "B. F. Brenner, one of the jurors sworn in the case, was a brother-in-law of Ezra Geist, the latter being a brother of Abram Geist, the injured deceased, and the person who was looking after the plaintiff's case, gathering evidence, sitting with plaintiff's counsel during the entire trial, and one of the witnesses of the plaintiff, and the witness who contradicted some of defendant's witnesses in most important particulars," is not a correct statement of the facts. In the argument this is modified into the statement that the juror and Ezra Geist had married foster sisters, but even this is not correct. The facts were, as stated by the judge in his opinion refusing a new trial, that "the juror was neither a relative of the plaintiff nor was he a relative of her brother-in-law, Ezra Geist. He had no acquaintance at all with the plaintiff, so far as we are informed. His wife's mother worked as a servant in the family of Ezra Geist's wife's father, and the child, who afterwards became Mrs. Brenner, was there at the time." The judge at the trial with the parties and jurors before him, is in far better position to determine the weight to be attached to circumstances of apparent favor or otherwise than we can possibly be, and it would require proof of a much closer connection between party and juror than was here shown, to justify us in interfering with his discretion.

Judgment affirmed.

Eberly, Appellant, *v.* Shirk.

Execution—Mortgage—Defeasance.

Where an owner of land conveys the same to a bank as security for notes, and no defeasance is executed at the time, and subsequently the bank conveys the land to a guarantor of the notes who has paid them, and thereafter the guarantor who has a judgment against the original owner issues execution thereon and sells the land as the land of the original owner, and buys it in, and the proceeds are sufficient to pay all judgments, the guarantor cannot claim the whole proceeds on the theory that the land really belonged to her. In such a case the original owner had an equity in the land, although not enforceable by reason of the Act of June 8, 1881, P. L. 84, and such equity is an interest which any creditor may sell on execution for whatever any purchaser may choose to give for it.

Argued May 19, 1903. Appeal, No. 23, Jan. T., 1903, by plaintiff, from judgment of C. P. Lancaster Co., April T., 1902, No. 4, on case stated in suit of Mary E. Eberly, Administratrix of Adam J. Eberly, Deceased, v. Aaron R. Shirk. Before Mitchell, Dean, Fell, Brown and Potter, JJ. Affirmed.

Case stated to determine the ownership of a fund raised by sheriff's sale of real estate.

From the case stated it appeared that A. J. Eberly, Esq., had indorsed A. R. Shirk in the People's National Bank of Lancaster. To protect the bank and Eberly, his indorser, Shirk conveyed his real estate to the bank. The bank soon after executed a defeasance to Shirk to the effect that it held the deed as security for the notes, and would reconvey on their payment. This defeasance never was recorded. Eberly's administratrix paid the notes made by Shirk and indorsed by her decedent, and the bank conveyed the property to her. Having another judgment against Shirk she then issued execution against him, levied on the identical real estate conveyed to her as his property, and exposed at sheriff's sale all his right, title and interest in it. He had several other judgment creditors, who attended the sale to protect their interests, but as her first bid of $2,500 was ample to cover their liens, the property was knocked down to her.

The administratrix claimed the whole fund on the ground (1) that she was the owner of the property she had caused to be sold as Shirk's, and (2) that as she had title to the property before the creditors' judgments were entered, they had no liens on Shirk's interest in it.

The court, in an opinion by LANDIS, J., awarded the fund amongst all the lien creditors of Shirk.

Error assigned was the judgment of the court.

William B. Eberly and *J. W. Denlinger*, for appellant.

W. U. Hensel, for appellees.

PER CURIAM, June 2, 1903:

The questions upon the defeasance and its effect as to the plaintiff's title to the land, raised and argued by appellant, are not in the case. The execution was against the land as the property of the defendant Shirk and what the sheriff sold under it was Shirk's title and interest, good or bad, large or small. At the time of the entry of the judgments, Shirk had an equity in the land which was recognized by the People's National Bank, though it was not enforceable by Shirk as mortgagor, because of the bar of the act of 1881. But it was an interest which any creditor might sell on execution for whatever any purchaser might choose to give for it. The fund produced by the sale therefore represents Shirk's interest in the land sold, and was properly distributed to the creditors having a lien on it.

Judgment affirmed.

Hogg's Estate.

Partition—Title from different ancestors—Defective return.

In a partition of equal undivided interests in land devised by different ancestors, a return to the order of inquest is fatally defective which values the entire real estate as that of one ancestor, when in fact the estate of that ancestor is only a two-thirds interest, and all the proceedings are had in the one estate.

Argued May 20, 1903. Appeal, No. 127, Jan. T., 1903, by Edna E. Hogg, from decree of O. C. Lancaster Co., March T., 1902, No. 4, sustaining exceptions to alias inquest in partition in estate of Robert Hogg, deceased. Before MITCHELL, DEAN, FELL, BROWN and POTTER, JJ. Affirmed.

Exceptions to alias inquest in partition and return.

SMITH, P. J., filed the following opinion:

Robert Hogg devised to his son, William H. Hogg, and his granddaughter, Edna E. Hogg, each an undivided one-third interest in a farm in Colerain township. Rachel Hogg devised to each of them the undivided one half of the other undivided one third of the same farm. Thus, William and Edna each owned an undivided one-half interest in a farm, the title to which came to them from different ancestors.

It will serve no purpose to recite the various steps in this somewhat protracted partition proceeding. Our attention is now directed to the alias inquest and return. While the petition for the inquest recites the wills of both Robert and Rachel Hogg, and traces the devisees' titles, it seems to contemplate a partition only of the undivided interests devised by Robert Hogg. The docket entries, as well as the indorsements on the various papers, filed, so indicate. The order reads: "It is ordered by the court, that the high sheriff of Lancaster county, do again summon a jury, to view the said premises and make partition thereof between the heirs and legal representatives of said deceased," etc. What deceased? Robert Hogg. Return of the inquest, in these words: "Appraised and valued 188 acres, more or less, (as within described,) at $39.00 per acre, amounting to $7,332." This return certainly did not imply the parting of or the appraising of several undivided interests in premises devised by different ancestors. The whole was appraised as having come from one. If the two-thirds interest devised by Robert Hogg had been specifically appraised and return thereto made, the exception might have been overruled and partition allowed as to the two-thirds interest; or if the respective interests, which came from the several ancestors, had been separately appraised and properly distinguished in the return, an amendment might have cured the

other defects. Irreconcilable inconsistencies bar the way to a confirmation of this return.

If it was the intention to partition the interests devised by both Robert and Rachel Hogg, it ought to have been made to so appear with particularity and the appraisement ought to have been clear and distinguishing. "The return of the inquest should be free of uncertainty or ambiguity. . . . This inquest ought to have been set aside for manifest defects even had no exceptions been filed. Often the sheriff and jurors are unfamiliar with practice in the orphans' court, and with the statutes relative to partitions. The statute provides that a reasonable allowance to the attorney for the petitioners may be made and taxed as if costs, and in many districts, such attorneys furnish the inquest with proper instructions and forms —a practice to be commended:" Christy's Appeal, 110 Pa. 538.

The confirmation of the inquest and return is refused.

The same is set aside at the costs of the petitioner.

Error assigned was the decree of the court.

B. F. Davis, for appellant.

W. U. Hensel, with him *B. Frank Kready*, for appellee.

Per Curiam, June 2, 1903:

This decree is affirmed on the opinion of the learned judge of the orphans' court.

Shuman, Appellant, *v.* Juniata Farmers' Mutual Fire Insurance Company.

Insurance—Mutual fire insurance—Assessments—Payment—Notice.

Where a mutual fire insurance company sends to a member a notice in the form of a bill to pay an assessment, and the notice also states that the treasurer of the company will be at certain places at dates named, to receive the assessments, and a by-law of the company provides that assessments must be paid within thirty days from the date of the notice, a member cannot claim that he is entitled to thirty days from the date when the

treasurer was to be at a place in the member's neighborhood. He must pay within thirty days of the date of the notice.

In an action to recover for a loss sustained by a fire after the expiration of the notice for payment of such assessment, plaintiff cannot offer in evidence the next subsequent notice of assessment which was different in form from the prior one. Such notice is not competent evidence that the former one was insufficient.

Argued May 26, 1903. Appeal, No. 347, Jan. T., 1902, by plaintiff, from judgment of C. P. Juniata Co., April T., 1901, No. 108, on verdict for defendant, in case of Uriah Shuman v. Juniata Farmers' Mutual Life Insurance Company. Before MITCHELL, DEAN, FELL, BROWN and POTTER, JJ. Affirmed.

Assumpsit on a policy of mutual fire insurance company. Before SHULL, P. J.

The facts appear by the opinion of the Supreme Court.

Verdict and judgment for defendant. Plaintiff appealed.

Errors assigned were among others (1) in ruling that the notice of assessment was sufficient; (4) in not admitting notice of assessment, No. 18, referred to in the opinion of the Supreme Court.

Louis E. Atkinson, of *Atkinson & Pennell*, for appellant.

J. N. Keller, with him *J. Howard Neely*, for appellee.

PER CURIAM, June 2, 1903:

In mutual insurance companies the prompt payment of assessments by the policy holders is essential to the life of the company. The amounts are relatively small and delay in payment means either larger assessments than are really required or danger of lack of funds for prompt settlement of losses. In the present case the limit of time for payment was expressly fixed in by-law 21, "when an assessment shall have been made on any premium note and the same is not paid within thirty days from date of notice to pay, protection against loss or damage by fire shall cease, until such assessment has been fully paid," etc. By the only reasonable construction of this by-law, notice to the policy holder of an assessment on his policy was a notice to pay it. Everybody understands that sending a bill

for goods bought or money due the sender on any account, is a notice to pay. The notice sent by the company in this case to the plaintiff was in form a bill. "Mr. Uriah Shuman to Juniata Farmers' Mutual Fire Insurance Co., Dr. To assessment No. 17 on policy 2023," etc. This was a clear call for payment and admits of no other reasonable understanding. Had it stopped there, the plaintiff would have been bound to know that under by-law 21 he must pay within thirty days of the receipt of the notice, or his protection under the policy would be suspended. The notice contained in addition to the statement of the assessment a notice that the treasurer of the company would be at certain places at dates named, to receive the assessments. This, however, was plainly for the convenience of the policy holders, and could not reasonably be taken as in any way modifying the requirement that the payment must be within thirty days. Plaintiff claimed to have understood that the notice gave him thirty days from December 7, when the treasurer was to be at Thomsontown, apparently a convenient place for plaintiff to make his payment. But such a claim has no reasonable basis. If he chose, for his convenience to wait until the treasurer came to Thomsontown on December 7, he should have paid there and then, otherwise what did it matter to him that the treasurer came there on that day or at all? If he found he did not want to take advantage of the presence of the treasurer in his neighborhood, he still had two weeks left of his thirty days in which to pay. But he neither paid on December 7 nor in the next two weeks, but allowed his full thirty days to run out without any intention to pay, so far as appears, until his interest was sharpened by the happening of his fire. This was a total disregard of his obligation, and he was bound to know that under by-law 21 the penalty would be suspension of his protection by the policy.

The notice of the subsequent assessment No. 18, was properly excluded. The company had a right to change its form of notice, and its doing so had no bearing on the sufficiency of the form previously used. Even if it was suggested by this plaintiff's perverse misconstruction of the first form, it would not on that account have been competent evidence that the latter was insufficient.

Judgment affirmed.

Mifflinville Bridge.

Railroads—Crossing of highways—Judicial supervision—Act of June 7, 1901.

Since the passage of the Act of June 7, 1901, P. L. 531, every grade crossing, whether of one railroad by another, or of a highway by a railroad, comes before the court with a heavy burden of proof upon it.

The fact that a grade crossing of a railroad over a highway is incidental to the relocation of an existing highway under the act of 1836, does not relieve such crossing from the ban of the first section of the act of June 7, 1901, which provides that "all crossings hereafter established" shall be above or below grade.

The provisions of section 4 of the act of June 7, 1901, which authorizes the court of common pleas to permit grade crossings under certain conditions, must be strictly followed, and there is no substitute for them either in manner or form. Previous proceedings in the quarter sessions, although before the same judge, cannot be considered as a substitute for the proceedings provided for in section 4.

On a petition under section 4 of the act of June 7, 1901, to locate a grade crossing of a railroad over the approach to a county bridge, it was alleged that the duties of the county commissioners ended at the bridge, and that the railroad tracks were so far from it that the construction of the crossing would be the work of the township authorities who were not before the court. The court dismissed the petition on the ground that prior proceedings in the quarter sessions under the act of 1836 were conclusive. *Held*, on appeal, that the decree should be affirmed, not for the reason stated by the court, but by reason of the questions of fact raised, and that the appellant should be turned over to the more plastic and convenient remedy of a bill to enjoin the construction of the bridge in such manner as would require the highway to cross the railroad at grade.

It seems that on an appeal from a decree dismissing a petition filed under section 4 of the act of June 7, 1901, that the appellate court, following the analogy of the rule in equity, may consider the reasons given by the lower court for its action.

Argued June 1, 1903. Appeal, No. 116, Jan. T., 1903, by defendant, from decree of C. P. Columbia Co., dismissed petition to regulate grade crossing in case of Mifflinville Bridge. Before MITCHELL, DEAN, FELL, BROWN, MESTREZAT and POTTER, JJ. Affirmed.

Petition under section 4 of the act of June 7, 1901, to regulate a grade crossing.

LITTLE, P. J., filed the following opinion:

This is a proceeding instituted by the county commissioners under the act of 1901, section 4, which by its terms became effective on June 1, 1902.

The petition recites that under certain proceedings had in the court of quarter sessions for the location of a county bridge across the Susquehanna river at Mifflinville, the proceedings of such county bridge were confirmed absolutely on July 7, 1902.

The petitioners further aver in their petition that the southern end of the bridge crosses the tracks of the Pennsylvania Railroad Company. It also recites further proceedings had by the county commissioners for the construction of the bridge and other matters; and prays for the court to make an order to establish a grade crossing of the railway and for gates, signals and other safeguards to be maintained by the railroad company; and assigns nine separate reasons why the court should make the order asked.

Answer was filed by the Pennsylvania Railroad Company, respondents, and a hearing was had. Upon the hearing testimony was offered on the part of the petitioners respecting the desirability and the necessity of a crossing at grade of the right of way of the railroad company. The respondents offered testimony as to the desirability for an overhead crossing.

From the evidence produced at the hearing it appears that on July 29, 1902, the commissioners entered into a contract with one Charles H. Reimard for the construction of the bridge and the approaches thereto as far as the wing walls, and that the same be completed by August 1, 1903, for the price of $93,985. The contractor is actively engaged in the construction of the bridge.

The proposed bridge is so designed as to meet the highway on either side of the river at grade. In order to do this, the floor at the southern or Miffinville end of the bridge will be six feet or more higher than the floor at the northern abutment. The respondent's proposed plan for an overhead crossing of the tracks of their railroad, affording nineteen feet in the clear above the level of the tracks at the point, involves an addition to the height of the piers of the bridge as already planned and contracted for, by the addition of steel cylinder

piers three eighths of an inch in thickness, securely fastened to the piers as designed, and to be filled with concrete, and the floor of the bridge placed upon an incline from the northern to the southern abutment. The addition added to the southern pier will be some eighteen or more feet in height; and also the construction of an additional pier on the south side of the railroad company's right of way. That the increased cost of the construction will be some $16,300, of which sum the respondents have offered to the county commissioners to contribute the sum of $12,000.

We are of the opinion that the act of 1901, under which this proceeding was instituted, has no application to the facts here. The purpose of the act was not to abolish all grade crossings. The act is entitled: "An act relating to railroad crossings of highways, and for the regulation, alteration and abolition of grade crossings, except in cities of the first and second classes." Its first section provides: "That, except as in this act elsewhere provided, all crossings, hereafter established, whether of highways by railroads or of railroads by highways, shall, except in cities of the first and second classes, be above or below the grade thereof." The second section relates to railroad companies constructing new lines of railroad. And the third section provides: "Every municipality or other authority, hereafter constructing a highway, ... across an existing railroad, shall construct the same above or below the grade thereof, unless permitted, in the manner hereafter provided, to construct the same at grade, and the cost of said work shall be paid one half by said municipality and one half by the railroad company owning said railroad." Its fourth section provides: "Whenever it shall be desired by any railroad company, constructing a new railroad, or by any municipality or authority, constructing a new highway, except in cities of the first and second classes, that the railroad or highway should be so constructed that the railroad and highway shall cross each other at the same grade, a petition shall be presented by the party desiring such construction to the court of common pleas of the district within which said crossing is situated, upon ten days' notice to the corporation owning said railroad or to such municipality or authority, describing the proposed construction, and setting forth the reasons that are supposed

to make the same necessary and desirable; and the court of common pleas shall thereupon have jurisdiction of the parties and the subject-matter of such petition, and may proceed summarily or otherwise, and upon such notice as it shall deem sufficient, to examine the matter, either by evidence, by reference to a master or commissioners, or otherwise, and if satisfied that such construction is reasonably required to accommodate the public or to avoid excessive expense in view of the small amount of traffic on the highway or railroad, or in view of the difficulties of other methods of construction, or for other good and sufficient reasons, then it shall make an order or orders permitting such crossing at grade to be established; and it may, in such orders, in its discretion, prescribe what gates, signals or other safeguards shall be maintained by the railroad company, in addition to the signals and safeguards prescribed by the statute; and all such orders shall be binding upon the parties, and shall be observed by them; all costs and expenses of the proceedings shall be ascertained and allowed by the court of common pleas, and shall be paid by such party as it shall decide, or be by it apportioned between the parties, and may be collected by execution out of said court." The tenth section of the act briefly provides that "nothing in this act shall prevent any railroad company from laying additional tracks on crossings previously existing, or from constructing switches and sidings and branch lines from their lines of railroad, now or hereafter constructed, to any mill, factory or other manufacturing establishment, ... or from laying additional tracks to increase their yard facilities at terminal or other points, across public highways at the grade thereof, outside of the corporate limits of cities of the first and second classes; but such sign posts and signals shall be employed for the protection of such crossings as are by law prescribed for railroad crossings of public highways."

It will be observed that this act relates to crossings hereafter established, first by railroad companies constructing new lines of railroad and any municipality hereafter constructing a new highway; while the tenth section allows crossings at grade of highways by railroad companies as mentioned in that section. There is nothing in the act which in any way interferes with the jurisdiction of the court of quarter sessions under the act of 1836. The jurisdiction of the court under that act could

not be interfered with except by some express legislative provision.

The proceeding for the location of this Mifflinville bridge was not a proceeding for the location of a highway under general law; but for the location of a county bridge to connect parts of an existing highway under the 35th, 37th and 38th sections of the act of 1836.

A petition was presented to the quarter sessions, asking for the appointment of viewers for the location of a bridge "over the north branch of the Susquehanna river . . . . at a point where said river crosses the public road or highway leading from a point in the public road between Bloomsburg and Berwick, near the village of Willow Grove, to the village of Mifflinville."

At the next February sessions, 1901, the viewers made report in favor of the bridge, and under the powers conferred upon them by the 37th and 38th sections of the act, they further reported: "That we have carefully examined the routes of the road crossing the said river over which the bridge is prayed for, and are of the opinion that the changes or variations in the bed of the said road would be an improvement and saving of expense in the erection of said bridge, which variations we have caused to be accurately surveyed and have returned a plot thereof with this our report, said change being as follows: ". . . . at the southern end of said proposed bridge, beginning at a point in the northern line of First street in the village of Mifflinville 270 feet west of the western line of Market street; thence across the village common north twenty-one degrees, west 139 feet to the right of way of the N. & W. B. R. R. Company; thence crossing said right of way at grade north twenty-one degrees, west 130 feet to the southern abutment of said bridge, said abutment standing on said commons at high-water mark."

The viewers were authorized to make that change in the highway. The statute gives the bridge viewers authority to report also whether any change in the course or bed of the road to be connected therewith will be necessary, in order to the erection of said bridge at the most suitable place or in the best manner, ... and cause every such variation to be accurately surveyed, etc.: Sections 37 and 38, act of 1836.

There is no ground for the contention now made that the road, as shown by the draft accompanying the report of viewers, from First street in Mifflinville to the southern abutment of the proposed bridge, is a new road. The case "In re County Bridge, 24 Atl. Repr. 695," was one in which the viewers exercised the powers of changing the bed of the highway, as was done by the viewers in the present proceedings. The second exception to the report of viewers there alleged that the viewers unlawfully laid out two entirely new roads and vacated no part of the old highway. The exceptions were dismissed, and the report confirmed absolute. The order was affirmed by the Supreme Court.

This action of the viewers did not lay out a new or additional public road, or establish a new or additional grade or other crossing of the tracks of the railroad company. The result of their action on the south side was to change the bed of this previously existing road, leading from the village on the south side of the river to the north village on the north side, where it intersects First street in Mifflinville, westwardly far enough to be in line with the southern abutment of the proposed bridge.

In this highway between the two villages there has been a grade crossing for a number of years. Probably it was located and constructed when the railroad company laid its tracks at the grade of that highway; and when the bridge viewers made this change in the bed of the road, the crossing was thereby changed as a necessary incident to the use of the highway as changed. The words employed by the viewers, "Thence crossing said right of way at grade," have no special significance. They are rather descriptive of what the viewers saw as forming part of the highway.

While a county bridge is a part of the highway yet this act of 1901 does not require an over or under crossing where, as in this instance, a grade crossing has long since been in use in the highway, parts of which the bridge was designed to connect.

The judgment of confirmation absolute of these bridge proceedings July 7, 1902, became conclusive, unless appeal was duly taken. The bridge was established by that decree.

The duty devolves upon the county to build and keep this and all other county bridges in repair, as well as the approaches

thereto. The approach to the bridge is a part of the bridge itself. The township road terminates where the approach begins: Catawissa and Main Twp. Road, 17 Pa. Superior Ct. 21; Westfield Boro. v. Tioga County, 150 Pa. 152.

This road leading from the village on the south to the north side of the river, the bed of which is changed, will be required to be taken care of by the supervisors of the respective townships, as formerly.

It is a mistaken view urged on the part of the petitioners that the southern approach of this bridge extends to First street.

Being of the opinion that the decree of the court of quarter sessions confirming these bridge proceedings is now conclusive, and in view of what the county commissioners have done subsequent to that decree, that certain rights of the contractor have attached, we should feel reluctant to make any changes in the construction of this bridge, unless great necessity required it, even if there were a statute which expressly provided for such change.

The respondent's proposition involves a change in the proposed construction as already planned and designed. By reference to the testimony of Oscar Thompson, a witness produced by the respondents, this change would appear to be of doubtful propriety.

The respondent's proposed change of this bridge, so as to accommodate an overhead crossing, would greatly enlarge the bridge, and increase the cost of its construction. It has been held that "where a bridge is to be enlarged or improved, viewers should be appointed as for a new bridge:" 3 Delaware County Rep. 165.

The circumstances here show that the 2d section of the act of April 11, 1848, would present another barrier to the accomplishment of such purpose, because the contractor and county commissioners have not agreed to the proposed alteration.

The point of crossing of the railroad company's right of way can be observed for quite a distance eastwardly, and at a much greater distance westwardly.

The court of common pleas will make no order which will in any way affect the judgment of the court of quarter sessions entered July 7, 1902. And therefore, for the reasons hereinbe-

fore given, it is now ordered that these proceedings be dismissed, at the cost of the county of Columbia.

Error assigned was decree dismissing the petition.

H. M. Hinckley, with him *L. E. Waller*, for appellant.

Herring and *J. B. Robinson*, for appellee, filed no paper-book.

PER CURIAM, June 2, 1903:

The settled policy of this state, legislative and judicial, is against the further increase of grade crossings. The act of June 19, 1871, gave the courts jurisdiction over crossings of one railroad by another at grade, and this court has more than once expressed its regret that the control did not extend to the crossing of a railroad and an ordinary highway. This control the act of June 7, 1901, has now given. Any grade crossing which thereafter comes before the court, comes with a heavy burden of proof upon it.

Under the conceded facts the crossing involved in this controversy is a new grade crossing and as such is prohibited by the act of 1901. The fact that it is incidental to the relocation of an existing highway under the authority of the act of 1836 does not relieve it of the ban of the act of 1901. The language of section first of the latter act is that "all crossings hereafter established" shall be above or below grade. This is a crossing in a different place, and is, therefore, "established" after the date of the act.

The command of section first is peremptory and universal except in the single instance specifically prescribed. The court of common pleas is authorized under section four to permit a grade crossing under certain conditions. But this jurisdiction must be exercised in the mode pointed out by the statute and is exclusive. There is no substitute for it, either in manner or form. The proceedings in the present case in the quarter sessions to authorize the bridge and the relocation of the old highway were wholly irrelevant. They were in a different court having no jurisdiction over this subject and the accidental fact that both courts were held by the same judge did not mingle or combine their separate jurisdictions. The discretion

of the common pleas under the statute can only be exercised in a direct proceeding for the purpose in the proper court.

A technical objection to a review of the decree is based on the ground that the appellant in its answer asked that the petition be dismissed and that the prayer was granted. With the reasons given by the court in its opinion it is said we have no concern. This point is not free from difficulty. In an action at law the opinion of the court is not part of the record and the judgment is the only matter strictly reviewable. In a proceeding in equity the rule is otherwise, and the chancellor's reasons are proper subject of consideration. The proceeding in the present case was unknown to the common law and the statute by committing it to the discretion of a judge who may proceed summarily in such manner as he thinks best, and by the latitude of powers with which it invests him, and in other ways, has assimilated it closely to a proceeding in equity. Whether, therefore, we might not take up the case as if upon an appeal in regard to an injunction is far from clear. But some questions have been raised as to the facts. It is said that the duties of the county commissioners end at the bridge and the railroad tracks are so far from it that the construction of the crossing will be the work of the township authorities who are not before us. Under these circumstances we have thought it best, without deciding the other question, to turn over the appellant to the more plastic and convenient remedy of a bill to enjoin the construction of the bridge in such manner as will require the highway to cross the railroad at grade.

This appeal is, therefore, dismissed without prejudice.

Wheeler, Appellant, *v.* Equitable Trust Company.

Insurance—Title insurance—Indemnity—Guaranty.

In an action upon a policy of title insurance which by its terms was a general contract of indemnity against loss from defects or unmarketability of title, but which contained in a note to a schedule a guaranty to complete certain buildings according to plans and specifications mentioned, the court will construe the whole contract to be one of indemnity, and will not permit the plaintiff to prove that the houses were not built in accordance with the plans and specifications, unless there is prior proof that the plaintiff suffered actual loss.

The note in such a case is intended to signify that if the buildings should not be completed in accordance with the specifications, then, if any loss be sustained thereby by plaintiff, such loss should come under the indemnification covenant of the policy. The contract is not intended by its terms to be severed into two, one to indemnify against loss from defects of title, and one to guarantee that the building shall be finished in accordance with the plans and specifications.

Argued Jan. 8, 1903. Appeal, No. 173, Jan. T., 1902, by plaintiff, from order of C. P. No. 5, Phila. Co., March T., 1901, No. 309, refusing to take off nonsuit in case of Susan Farnum Wheeler, Executrix of Charles Wheeler, Deceased, v. Equitable Trust Company. Before MITCHELL, DEAN, FELL, BROWN, MESTREZAT and POTTER, JJ. Affirmed.

Assumpsit on a policy of title insurance. Before RALSTON, J.

The facts are stated in the opinion of the Supreme Court.

When Frank Loughran was on the stand the following offer was made:

I offer to show that the seventeen houses on Douglas street, between Foster and Arch streets, west of Thirty-second, were not built in accordance with the plans and specifications filed with the Equitable Trust Company, in accordance with the policy, by John D. Pharoah, and the cost necessary to make those houses conform to those plans and specifications.

Mr. Brown: You offer to prove that by this witness?

Mr. Taylor: Yes.

Mr. Brown: I object because it is irrelevant and because the witness is not qualified to testify as, of, or about February 25, 1899, when completion was claimed to have been guaranteed.

Objection sustained.

Exception for plaintiff.

The court entered a compulsory nonsuit which it subsequently refused to take off.

Error assigned was refusal to take off nonsuit.

C. Berkeley Taylor, for appellant, cited: Union Trust Co. v. Citizens' Trust & Surety Co., 185 Pa. 217; German-American Title & Trust Co. v. Citizens' Trust & Surety Co., 190 Pa. 247.

Ira Jewell Williams, with him *Simpson & Brown*, for appellee, cited: Wheeler v. Trust Co., 160 Pa. 408; Seymour v. Trust, etc., Co., 203 Pa. 151; German-American Title, etc., Co. v. Citizens' Trust, etc., Co., 190 Pa. 247.

Opinion by Mr. Justice Dean, July 9, 1903:

The Equitable Trust Company on May 15, 1898, delivered to plaintiff, executrix of Charles Wheeler, deceased, a policy of title insurance in the amount of $50,000. The subject insured was a mortgage for $61,500, made by John D. Pharoah, on seventeen ground rents issuing out of seventeen lots and buildings thereon, situate on Douglas street in Philadelphia. This mortgage was taken by plaintiff as collateral security for a loan. It is not alleged that there is any defect in the title to the ground rents which has rendered them unmarketable. The policy stipulates that defendant "will indemnify, keep harmless and insure the said Susan Farnum Wheeler, executrix, ... against all loss or damage not exceeding fifty thousand dollars," arising from defects or unmarketableness of title or loss as described in schedules A and B, which are set out in and form part of the policy. In a note to schedule B occurs this statement:

"Note.—The completion of seventeen buildings on said lots of ground in accordance with the plans and specifications filed with this company by John D. Pharoah within nine months of the date hereof (unless destroyed by fire) together with all municipal—John H. Connellan—improvements free of municipal liens is hereby guaranteed."

Pharoah, who had mortgaged the ground rents to plaintiff for a loan to him, having defaulted in payment of the rents, the mortgage was foreclosed and the ground rents purchased at sheriff's sale by Richard M. Elliot for Mrs. Wheeler, the price at which they were knocked down being only $500. The plaintiff then brought suit against the trust company for damages sustained by her by breach of the conditions of the policy of insurance. The breach averred by her was of the stipulation in the note to schedule B as heretofore quoted, in that, the houses, as she averred in her statement, were not completed according to the plans and specifications filed with the trust company by John D. Pharoah.

At the trial plaintiff, after showing that she purchased the ground rents at sheriff's sale on the mortgage and reading in evidence her policy of insurance, called to the witness stand Frank Loughran, a builder of experience, and made the following offer:

"I offer to show that the seventeen houses on Douglas street, between Foster and Arch streets, west of Thirty-second, were not built in accordance with the plans and specifications, filed with the Equitable Trust Company in accordance with the policy, by John D. Pharoah, and the cost necessary to make those houses conform to those plans and specifications."

This was objected to by defendant, on the ground that the evidence was irrelevant, and on the further ground, that witness had made no examination of the houses, until some time after the policy was issued. The court sustained the objection. Plaintiff declined to offer further evidence and thereupon the court directed a nonsuit, which it afterwards refused to take off and we have this appeal by plaintiff assigning for error the rejection of the testimony of Loughran.

Whether this testimony was relevant, depends upon a proper construction of the policy. Was it an indemnity against loss or damage by a failure of the mortgage as security? Or was it a guarantee for completion of the buildings as specified in the note to schedule B? If the latter, the testimony was relevant; if the whole instrument was merely a covenant to indemnify against loss or damage, then the testimony when offered was irrelevant and properly rejected. The policy in its general terms is one of indemnity. In the commencement clause it says: "The Equitable Trust Company in consideration of the sum of $1,125 to them paid by Susan Farnum Wheeler, etc., do hereby covenant that they will indemnify, keep harmless" her against all loss and damage not exceeding $50,000 which the insured shall sustain by reason of any defects in or unmarketability of the title to the property which is the subject of the mortgage. Excepting, however, defects, liens and incumbrances specified in schedule B. These are listed thus: accuracy of description, taxes of 1898, water rents, building restrictions, mechanics' liens not of record. Then follows the note which guarantees the completion of the seventeen buildings within nine months from the date of the policy,

free from liens for municipal improvements. It seems to us the policy was one of indemnity alone; the word "guarantee" is used in the note but its use in that connection does not change or split into two parts the general intent of the contract which is one of indemnity. The plainly expressed intent is to indemnify against loss from defects or unmarketability of title; then come certain exceptions in schedule B; but these do not fully express the intent of the parties, so the note is added, making an exception to the exceptions; that is, John D. Pharoah will within nine months complete the building according to the plans and specifications and free from municipal liens and inprovements. That is, notwithstanding the exceptions, the general indemnity contract shall extend to and cover any loss from failure in these particulars. The note although inaptly worded is intended to signify, that if the buildings should not be completed in accordance with the specifications then, if any loss be sustained thereby by plaintiff, such loss should come under the indemnification covenant of the policy.

But the contract is not intended by its terms to be severed into two, one to indemnify against loss from defects of title and one to guarantee, that the buildings shall be finished in accordance with certain plans and specifications. If the contract were one of guarantee, then the plaintiff, although she may have lost nothing on her collateral, instead may really have largely profited by the sale of it, would have a right to recover; on the other hand if the contract were one of indemnity alone, she could not recover unless she proved a loss on the mortgage. This is the substance of the decisions in Wheeler v. Real Estate Title Ins. & Trust Co., 160 Pa. 408, and Seymour v. Tradesmen's Trust, etc., Co., 203 Pa. 151. We hold that this policy, taking it as a whole, is a contract of indemnity and recovery can be had on it only as such.

The plaintiff avers that the houses were not completed according to the plans and specifications and that their value in consequence has depreciated in the sum of $15,174, but she does not aver any loss on the mortgage which she took as collateral for her loan; she bought in all the ground rents and now owns them: for anything that appears, they may be worth far more than the mortgage and she may be largely the gainer,

notwithstanding the failure to complete the houses according to the specifications. As preliminary to a recovery on the stipulation of the note to schedule B plaintiff must show that she has not been indemnified and saved harmless on her collateral mortgage; that defendant has failed in that particular; then she can go further, and show that the failure to complete the building caused, or tended to cause, the loss.

This was in effect the ruling of the learned trial judge when he says: "If any loss is shown the plaintiff will be entitled to show the condition of the buildings in accordance with the German-American Co. v. Citizens Tr. & Surety Co., 190 Pa. 247, and show the difference in their value as they were, and as they would have been had they been completed according to the specifications."

In view of what we have said, we think the court below properly held, that at that stage of the trial Loughran's evidence was irrelevant and therefore rejected it. This being the only assignment of error it is overruled and the judgment is affirmed.

Waterhouse *v.* Waterhouse.

Husband and wife—Dower—Fraud—Judgment—Scheme to defraud wife.

The law will lay its hands upon a fraudulent scheme to deprive the wife of her dower and will open or stay proceedings upon a judgment confessed without a full bona fide consideration.

A husband became hostile to his wife and threatened that if she did not leave the home in which she lived that he would get rid of all his property and leave the state. Shortly after he confessed a large judgment to his brother, upon which execution was issued and the house where the wife lived was seized and advertised for sale. The wife then filed a petition to intervene so as to protect her dower rights, and for a rule to open the judgment. On testimony taken under the rule the two brothers refused to answer relevant questions until they were forced to do so by the court. Their testimony as to the consideration for the judgment note was not free from contradictions. *Held*, that the wife was entitled to have the judgment opened, and also to have an issue to determine (1) whether there was a good consideration for the judgment, and (2) whether the judgment had been confessed collusively for the purpose of defrauding her.

Argued Jan. 9, 1903. Appeal, No. 214, Jan. T., 1902, by Georgena K. Waterhouse, from order of C. P. No. 1, Phila. Co.,

Dec. T., 1901, No. 3654, discharging rule to open judgment in case of William H. Waterhouse v. Edward L. Waterhouse. Before MITCHELL, DEAN, FELL, BROWN, MESTREZAT and POTTER, JJ. Reversed.

Rule to open judgment.

From the record it appeared that on January 31, 1902, Edward L. Waterhouse confessed judgment in the sum of $12,000 to William H. Waterhouse, and on February 4, 1902, the judgment note was entered up and execution issued against Edward L. Waterhouse. On February 28, 1902, Georgena K. Waterhouse filed a petition setting forth that said judgment note was without consideration and was given collusively to defraud her of her dower rights. The court granted a rule to show cause why the judgment should not be opened and Georgena K. Waterhouse allowed to intervene and defend. An answer was filed and subsequently amended denying the fraud and want of consideration alleged in the petition. After argument the court discharged the rule.

Error assigned was the order of the court.

Francis Shunk Brown, with him *Alex. Simpson, Jr.*, and *Henry K. Fries*, for appellant.—Where judgment has been confessed to defraud a wife of her dower rights the judgment will be opened and the wife allowed to intervene and let into a defense: Wells v. Bunnell, 160 Pa. 460; Sigle v. Seigley, 9 Kulp, 471; Duquesne Savings Bank's App., 96 Pa. 298; Houseman v. Grossman, 177 Pa. 453.

There is sufficient evidence of fraud in this case to warrant the court in opening the judgment: Brinks v. Heise, 84 Pa. 246; Lowe v. Dalrymple, 117 Pa. 564; Kaine v. Weigley, 22 Pa. 179; McMichael v. McDermott, 17 Pa. 353; Abbey v. Dewey, 25 Pa. 413.

Albert E. Paterson, with him *S. Walter Foulkrod*, for appellee.—In the absence of proof of fraud, a person not a party to the record has no standing in law or equity to question by petition the validity of a judgment in personam: Gaehring v. Haedrich, 8 Pa. Superior Ct. 507.

An application to open a judgment entered on a warrant of attorney or on a judgment note, is addressed to the equitable powers of the court below, and upon an appeal to the Supreme Court under the Act of May 20, 1891, P. L. 101, the question is, whether the court below exercised its discretion on the evidence: Kelber v. Plow Co., 146 Pa. 485; Blauvelt v. Kemon, 196 Pa. 128.

The appellant failed to prove want of consideration, conspiracy or fraud and the court very properly discharged the rule.

Opinion by Mr. Justice Dean, July 9, 1903:

The petition of Georgena K. Waterhouse set out that she is the wife of defendant; that the judgment is for $12,000 entered on judgment bill dated January 31, 1902; that judgment was entered on the bill three days after its date and execution immediately issued and the real estate of her husband levied upon and advertised for sale; that plaintiff, William H. Waterhouse, is a brother of her husband, the defendant. That the judgment bill was given without consideration by her husband and fraudulently in collusion with his brother for purpose of depriving her of dower in the land levied upon under color of a judicial sale. That the property seized is the home of herself and her husband and that he has notified her she must leave the property and leave him, otherwise he will put the property out of his name and leave the commonwealth. She therefore prayed the court for leave to intervene so as to protect her dower rights, and that a rule be granted on plaintiff to show cause why the judgment should not be opened and she be allowed to defend.

The rule was granted as prayed for; on hearing the court below discharged the rule and the wife brings this appeal. The court filed no opinion and gave no reasons for the decree, so we are left to practically pass upon the evidence as if this were a first hearing of it.

Leaving her inference and conclusions in her petition altogether out of it, the facts set out are not disputed. The husband and his brother became hostile to the wife. The husband did not want to risk the penalty of deserting her, so he sought to drive her away from their home; if she did not leave he threatened that he would get rid of all his property and leave

the state. Of couse, to aid him in his purpose she would not relinquish her dower; this would at least hamper if not effectually prevent, a sale. Just at this juncture this large judgment is confessed to the brother, execution issued and seizure of the home made. The undisputed facts thus far raise at least a grave suspicion of a collusion to deprive her of her lawful right of dower, for a lawful judicial sale on a bona fide debt of the husband would forever discharge the property from her claim.

Under these facts, the burden was on the plaintiff to establish by the preponderance of testimony, that the judgment was honestly confessed for a bona fide debt due him from the defendant. The power and duty of the court to aid the wife sought to be defrauded is well settled. In the very late case of Wells v. Bunnell, 160 Pa. 460, we said: "The law will lay its hands upon a fraudulent scheme to deprive the wife of her dower and will open or stay proceedings upon a judgment confessed without a full bona fide consideration." There are many other authorities to the same effect. Of course, if the judgment was fraudulent and without consideration, the brothers would not openly proclaim their agreement as to its purpose; when the wife was to be cheated they would not call witnesses to their agreement; as in most cases of this character circumstances which afford a fair inference of the purpose are alone capable of proof. Here is a threat of the husband; then the confession of judgment for a large amount to his brother and the immediate seizure on execution of the home in which the wife lived. The plaintiff testified that the debt was the accumulation of small loans made by him to his brother running for years. We can conceive, that if the husband had become indebted to the brother the latter might desire the security of a judgment lien, but just why this fraternal affection which had prompted small loans and indulgence for twelve years without any security should all at once impel him to exact a judgment followed by immediate sale of the brother's property is not clear and certainly is not made clear by the conduct and testimony of the two brothers. They were both called by the wife to testify as if under cross-examination.

Notice first, the conduct of plaintiff, William H. Waterhouse, on the witness stand. This is a sample of his examination:

"Q. State where, when and under what circumstances a judgment note for $12,000 dated January 31, 1902, was given by Edward L. Waterhouse to you? Witness refuses to answer. Q. Was Edward L. Waterhonse indebted to you January 31, 1902, in the sum of $12,000 or any other sum? Witness refuses to answer."

A number of other questions were then put to witness, all of which he refused to answer, when this one involving the very subject of dispute was asked: "Is it not a fact that said judgment was confessed by your brother to you without any consideration whatever, and that he is not indebted to you in any sum whatever, and that said judgment note was given by him as a result of and in pursuance of a conspiracy between you and him to transfer the title of the Arrat street property in fraud of the dower rights of Georgena K. Waterhouse, his wife, so that the brother might avoid the proper support and maintenance of his wife?" The witness refused to answer. Many other questions tending to elicit material facts were asked, and to all he refused to answer.

It is wholly immaterial if their refusal was based on the advice of counsel. If the judgment was an honest one given for a good consideration, these two witnesses perhaps alone knew the fact, yet in face of the suspicion raised by the circumstances and the direct, express accusation of the wife, they refused to disclose the truth if such were the truth, which would effectually have answered the accusation. From that moment a court might well doubt the candor of the two men and the honesty of the transaction. As is said in Kaine v. Weigley, 22 Pa., 179: "It is no hardship upon an honest man to require a reasonable explanation of every suspicious circumstance, and rogues are not entitled to a veto upon the means employed for their detection."

But the witnesses did not answer and the hearing went over from March 8, 1902, to May 5, 1902; in the meantime the court directed the witnesses to answer. When called again they answered and undertook in quite long statements to show the consideration for the judgment note.

To our minds the testimony is not free from contradictions. But it would be out of place in view of the decree which we feel we must make to carefully compare and analyze it, because

plaintiff has a right to go before a jury without unnecessary adverse comment on the testimony by this court. We think, taking the undisputed facts with the testimony, that the wife has a right to ask that it be passed upon by a jury. The decree of the court below discharging the rule is reversed, and it is directed that it be made absolute. Further, it is ordered that she be allowed to intervene as a party defendant, and that an issue be framed in the court below to determine:

1. Whether there was a good consideration for the judgment bill.

2. Whether it was executed and delivered by Edward L. Waterhouse to William H. Waterhouse, collusively, for the purpose of defrauding the wife of her dower in the land.

Norris, Appellant, *v.* Crowe.

Equity—Mistake—Ignorance of the law.

In no case is ignorance or mistake of the law with the full knowledge of the facts, per se a ground for equitable relief. If the evidence shows, that in addition there would be great hardship in enforcing the contract made in ignorance of the law, equity may afford relief. But between the border of great hardship and actual fraud there are many contracts made in ignorance of the law, yet which result in no inequitable consequences from the enforcement of the general rule. In such cases the rule should be enforced.

Ground rents—Agreement as to reduction of rent—Mistake in law—Equity—Remedy at law.

Where an owner of a ground rent agreed in writing under a threat of payment of principal to reduce the rent from six per cent to five per cent, and both the owner of the ground rent and the terre-tenant were ignorant at the time of the agreement of the decision in Palairet v. Snyder, 106 Pa. 227, in which it was held that a ground rent of the kind in question was an irredeemable one, the mistake in law is no ground for the interference of a court of equity to cancel the agreement in the interest of the owner of the ground rent. In such a case there is no element of such extreme hardship as will call for a departure from the general rule.

In the above case after the ground landlord discovered his mistake he brought an action at law to recover the full six per cent, and while this action was pending filed a bill in equity to cancel the agreement. *Held*, that the bill should be dismissed, because (1) plaintiff had a full, adequate and convenient remedy at law, and (2) equity had no jurisdiction to correct the mistake of law alleged.

Argued Jan. 19, 1903. Appeal, No. 277, Jan. T., 1902, by plaintiff, from decree of C. P. No. 4, Phila. Co., Dec. T., 1900, No. 901, dismissing bill in equity in case of Isaac Norris *v.* James Crowe and the Ninth United Presbyterian Congregation of Philadelphia. Before MITCHELL, DEAN, FELL, BROWN, MESTREZAT and POTTER, JJ. Affirmed.

Bill in equity to cancel an agreement in writing under seal.

On demurrer, WILLSON, J., filed the following opinion:

On December 7, 1866, Charles Norris et al., trustees of the Fairhill estate, and Samuel Norris, made a conveyance to James Crowe of a certain lot of ground situate on the west side of Hancock street and south side of Susquehanna avenue, reserving thereout a yearly six per cent ground rent of $340, payable in equal half yearly installments on the first day of January and July in each year thereafter. The deed also contained a provision that in case the grantee, his heirs and assigns, should, within ten years from the date of the deed, pay to the grantors, or their heirs or assigns, the sum of $5,666.67, and the arrears of rent, the rent reserved should cease and be extinguished. The said James Crowe took title to the said premises only to hold it for the benefit of the church, of which he was pastor, and subsequently, on December 13, 1893, by deed, duly recorded, he conveyed the same to the Ninth United Presbyterian Congregation of Philadelphia, the defendant in this case. By proceedings in partition the estate in the grantors became vested in Isaac Norris, Sr., and, subsequently, in the plaintiff in this proceeding.

The proper discussion of the case does not require any fuller recital of the matters which have been referred to. The real controversy arises upon what took place in the year 1891. The bill averred that in May of that year a committee of the defendant corporation called upon J. Parker Norris, the brother of the plaintiff, and who acted for him, and informed the said Mr. Norris that the defendant would pay off the ground rent, unless the yearly rent was reduced from six to five per cent per annum. In consequence of this movement on the part of the defendant corporation, an agreement, under seal, was entered into between the plaintiff, acting by his brother, J. Parker Norris, and the defendant, in the following language:

"Memorandum of agreement made this twelfth day of June, A. D. 1891, between the Norris Square United Presbyterian Church of the one part, and Isaac Norris, M. D., of the other part.

"Witnesseth, that in consideration of the said Isaac Norris, M. D., not demanding more than five per cent interest on a certain annual ground rent reserved by deed dated December 7, 1866, the said Norris Square United Presbyterian Church, doth hereby agree that they will not pay off the principal of the said ground rent until the expiration of five (5) years after the first day of July, 1891, and the said Isaac Norris, M. D., doth hereby promise and agree that he will not, at any time, ask, demand, or sue for more than five per cent interest on said ground rent so long as the said church continues to pay the same with reasonable punctuality.

"Witness our hands and seals the day and year aforesaid.

"Isaac Norris, M. D.,
"By his attorney in fact,
"J. Parker Norris. [Seal]
"Robert G. Bitten,
"[Corporate Seal] President.
"C. W. Crowe,
"Secretary Board of Trustees."

At the time this agreement was entered into, all parties concerned in it were of the impression that the defendant corporation had a right at any time to make payment of the principal sum of the ground rent, and thereby extinguish the ground rent; in other words, that the ground rent was a redeemable ground rent. They were not aware that it had been decided by the Supreme Court in Palairet v. Snyder, 106 Pa. 227, that, upon the failure of the covenantor in the ground rent deed to pay the principal sum within the time limited in such a deed, the ground rent became irredeemable. However, it must be regarded as beyond question that, if Dr. Norris, acting through his attorney in fact, had not consented to the reduction of the annual rent, and the defendant corporation had carried out its expressed intention of paying off the said rent, payment would have been received and the ground rent would have been extinguished. This no doubt would have been done under a

mistaken view of the law. At the same time, if it had been carried into effect, the act would unquestionably have been beyond recall.

The plaintiff, by this proceeding, endeavors to have the agreement referred to abrogated and to reinstate himself in the position in which he was before that agreement was entered into, notwithstanding for a period of about ten years the church corporation has paid the annually accruing ground rent as reduced, and the same has been accepted by the plaintiff. It is claimed that this can be done, because the parties entered into the agreement in question under a mistaken view of the law.

Suit was brought in this court upon the ground rent deed against the defendant in March, 1901, for the purpose of recovering the amount due on January 1, 1901, at the full rate of six per cent instead of five. In that proceeding the defendant filed an affidavit of defense, setting up the matters which have been previously stated, and the court, after argument, refused to enter judgment for the plaintiff. Nothing further has been done in that case since the refusal to enter judgment.

We are now asked to decree that the defendant shall surrender for cancelation the agreement before mentioned, and be enjoined from setting up the agreement as defense in the action at law referred to, or in any future action.

It seems to us that it would be a sufficient reason for us to sustain the demurrer which has been filed in this case, that the plaintiff has a full and complete opportunity, in the case at law which he has brought, to have the question upon which he relies fully and conclusively determined as between him and the defendant. In other words, he has a full and adequate remedy at law, and he has, by instituting action upon the covenant contained in the ground rent deed, already attempted to bring the question which is now at issue to determination upon the law side of the court. Nevertheless, it may be well for us to go further in the case and express our views in regard to the main question involved in it.

As has already been said, the parties to the agreement reducing the amount of annual rent from six to five per cent, entered into it with a mistaken view as to what their legal rights were. Ordinarily, parties will not be relieved against

the consequence of a mistake of the law, even though it be mutual. This principle is so fundamental as to have been embodied in a well-known maxim. It may be true, as has been argued before us, that the rule has its exceptions, and that where the mistake has been one which does not involve ignorance of a general principle of the law, but rather ignorance as to the legal effect of a particular agreement or transaction in which the parties are interested, then a court of equity may relieve against the effect of a mistake, in order to avoid manifest injustice. Even the presence of seals attached to such an agreement might constitute no obstacle to relief, notwithstanding the general principle that the presence of a seal imports a consideration. If, however, the case required us to pass upon the question, we are inclined to the opinion that the plaintiff could not have the relief which he seeks, upon the ground relied upon by him, viz: that his case falls under an exceptional class of a mutual mistake relative peculiarly and exclusively, to the rights of the parties growing out of a particular agreement or transaction, as distinguished from a mistake concerning a general and larger principle of law. We rather think that even upon that aspect of the question the plaintiff ought to be held to his agreement, by an application of the general and salutary principle which has been referred to, that when two persons solemnly enter into an agreement and act upon it for a term of years on the common understanding that an advantage accrues to one of the parties or a disadvantage to the other, the fact that there was a mistake made as to their legal rights and obligations will not relieve either party from an obligation so entered into and acted upon. Besides, it is impossible not to be influenced by the thought that the agreement which the parties entered into, although it was made under a mistaken view of the law, withheld the defendant corporation from taking such steps as would have resulted in an extinguishment of the ground rent estate. Such an extinguishment was evidently not desired by the plaintiff or his representative, and it was averted by the making of the agreement which the plaintiff now endeavors to set aside. That was a real advantage which he thus secured, and he obtained it by entering into a formal agreement, to which he attached the ordinary evidence of a valuable consideration. For the

reason stated, we think that he must be held to the bargain which he then made, and that he cannot be relieved from it, notwithstanding he and the defendant now know and admit that they acted under a mistaken impression of what their legal rights and obligations were.

The demurrer must, therefore, be sustained and the bill dismissed with costs.

Error assigned was the decree of the court.

John G. Johnson, with him *Horace M. Rumsey*, for appellant. —The question of mistake is peculiarly a question of equitable jurisdiction: Green v. Morris, etc., R. R. Co., 12 N. J. Eq. 165.

Equity abhors a multiplicity of suits, and where, in a single suit, that condition can be avoided by enjoining its use, equity will perform that office: Gwinn v. Lee, 6 Pa. Superior Ct. 646; Johnston v. Price, 172 Pa. 427; Walters v. McElroy, 151 Pa. 549; Bitting's Appeal, 105 Pa. 517; Penna. Lead Company's Appeal, 96 Pa. 116; Grubb's Appeal, 90 Pa. 228; Scheetz's Appeal, 35 Pa. 88.

The pending suit at law is not a bar to the equity proceeding: Hessenbruch v. Markle, 194 Pa. 581; Harrisburg v. Ry. Co., 1 Pa. Dist. Rep. 192; Raessler v. Benefit Assn., 3 Pa. C. C. Rep. 393; Watson v. Jones, 80 U. S. 679; Griswold v. Hazard, 141 U. S. 260 (11 Sup. Ct. Repr. 972); Green v. R. R. Co., 12 N. J. Eq. 165.

The ground rent was irredeemable and there was no consideration for the agreement: Walstrom v. Hopkins, 103 Pa. 118; McNutt v. Loney, 153 Pa. 281; Palairet v. Snyder, 106 Pa. 227.

Equity will relieve from a mutual mistake of law, and where an instrument has been executed under such mutual mistake of law, will enjoin its use in an action of law and will declare it null and void: Snell v. Ins. Co., 98 U. S. 85; Beauchamp v. Winn, L. R. 6 H. L. 223; Jones v. Clifford, L. R. 3 Chan. Div. 779; Underwood v. Brockman, 4 Dana's Repr. 309; Green v. R. R. Co., 12 N. J. Eq. 165; Frevall v. Fitch, 5 Whar. 325; Bishop v. Reed, 3 W. & S. 261; Gross v. Leber, 47 Pa. 520; Wilson v. Ott, 160 Pa. 433; McKibben v. Doyle,

173 Pa. 579; Potter's Est., 6 Pa. Superior Ct. 627; Russell's Appeal, 75 Pa. 269; Wilson v. Ott, 173 Pa. 253; Goettel v. Sage, 117 Pa. 298.

Where certain facts are assumed by both parties on the basis of a contract, and it subsequently appears such facts do not exist, the contract is inoperative: Fink v. Smith, 170 Pa. 124: Miles v. Stevens, 3 Pa. 21; Frevall v. Fitch, 5 Whar. 325; Horbach v. Gray, 8 Watts, 492.

No paper-book filed or argument offered for appellee.

Opinion by Mr. Justice Dean, July 9, 1903:

In this appeal appellee has given us no aid by filing a paper-book and we are left to dispose of the issue by the presentation of appellant's side of it and on the carefully considered opinion of the learned judge of the court below. The facts are about as follows: On December 7, 1866, the trustees of the Norris estate conveyed to Rev. James Crowe, minister of the Ninth Presbyterian congregation of Philadelphia, a lot of ground on the corner of Hancock street and Susquehanna avenue, reserving thereout a yearly six per cent ground rent of $340. Afterwards, in 1893, the Reverend Crowe conveyed the property to his congregation which at that date had become incorporated. By proceedings in partition of the estate of Isaac Norris, Sr., in 1867, this particular ground rent became the property of Dr. Isaac Norris, this appellant. J. Parker Norris, his brother, was in 1891 his attorney in fact, and in that year a committee of the church corporation called upon and notified him, that unless the ground rent was reduced from six to five per cent the congregation would pay it off. Both parties assumed that the ground rent was redeemable and therefore could be paid off at the option of the lot owner. It was agreed, that the reduction to five per cent should be made, but that the option should not be exercised for five years; thereupon, the following agreement in writing, signed and sealed, was executed:

"That in consideration of the said Isaac Norris, M. D., not demanding more than five per cent interest on a certain annual ground rent reserved by deed dated December 7, 1866, the said, the Norris Square United Presbyterian Church, doth hereby agree that they will not pay off the principal of the said ground

rent until the expiration of five (5) years after the first day of July, 1891, and the said Isaac Norris, M. D., doth hereby promise and agree that he will not, at any time, ask, demand, or sue for more than five per cent interest on said ground rent so long as the said church continues to pay the same with reasonable punctuality."

The case of Palairet v. Snyder, 106 Pa. 227, appeal from common pleas, No. 1, of Philadelphia, had been decided by this court in 1884. The reservation of ground rent in that deed was substantially the same in terms as in the one before us, and we held the ground rent was irredeemable; although that case had been the law for seven years both parties were ignorant of it. The congregation thereafter continued to pay the ground rent at five per cent as stipulated in the agreement and Norris continued to accept the same without objection until January 28, 1901, when Norris discovered the decision in Palairet v. Snyder and concluded that his ground rent was irredeemable; he at once demanded from the congregation six per cent and on refusal to pay brought assumpsit in common pleas, No. 4, of Philadelphia. To this the congregation filed an affidavit of defense denying liability for more than five per cent and averring, the stipulation in the agreement, as limiting liability to that amount. While the record of the action at law stood in this condition, on January 10, 1902, Norris filed this bill, praying that the agreement be declared void and that it be delivered up for cancelation on the ground that it was entered into under a mistake as to the law by both parties, and further, specially praying that defendant be enjoined from setting it up as a defense in the action of assumpsit. The defendant demurred on the grounds that an action at law involving the same matter was then pending and that on the face of the bill plaintiff had no equity of which a court of equity would take jurisdiction. The court below sustained the demurrer and dismissed the bill, first, because plaintiff had an adequate remedy at law; and second, because the mistake of law was one which under the facts averred in the bill, equity would not relieve against.

We think that plaintiff had an adequate remedy at law. He had brought his action in assumpsit and defendant had filed affidavit disclosing fully its defense, based on the agreement.

At the trial plaintiff would have offered his deed of 1886 to Reverend Crowe reserving his six per cent ground rent; defendant would then have put in evidence the agreement of June 13, 1891; plaintiff would then have replied with evidence of mutual mistake of the law by the parties; it would then have been for the court to interpret the agreement and declare its effect in view of the undisputed evidence and to have directed a verdict. Why would not this have been an adjudication of the very issue raised by this bill and demurrer? It is suggested, that it would not have been an adequate or convenient remedy because suits could still have been brought in the future for each six per cent annual ground rent as it fell due. We do not think so; the judgment would have been res adjudicata as to whether the ground rent was five or six per cent. If plaintiff had won he could have brought suit for six per cent and defendant could have defended only on proof of payment of that rate; but if defendant had won and plaintiff had sued for six per cent, plaintiff would have lost his case; obviously one suit at law would have ended litigation. We think the remedy at law was both adequate and convenient and that the court below might properly have dismissed the bill on this ground alone.

But probably, because the same question would have had to be determined in the action at law, that is, the effect of the agreement made under a mutual mistake of law, the court saw fit to go further, and determine whether on the facts the plaintiff should in equity be relieved from the consequence of it. The maxim, "Ignorantia legis neminem excusat" undoubtedly applies where the ignorance is of a well known rule of law, or as it is sometimes stated, ignorance of a general rule of law; but where the ignorance is of the law is specially applicable to the determination of a private right and the ignorant party complains because he has been prejudiced by the contract, it does not follow that equity will in all cases afford relief. By simply filing a demurrer, of course, the defendant admits the material averments of the bill and the material averment is, that the agreement was prompted by a mutual ignorance of the law as applicable to reservations of ground rent in the terms incorporated in this deed; both parties acting in the belief that this ground rent was redeemable, whereas in law it was not.

Will equity under these facts afford plaintiff relief from the consequences of his ignorance of the law? Under what circumstances and as to what contracts the maxim would be enforced seems to have been first fully discussed by this court in Good v. Herr, 7 W. & S. 253, in an elaborate opinion by ROGERS, J. In that case a childless man died intestate possessed of a large estate in land, leaving a widow, two uncles and an aunt living, and children of two uncles who were dead. The widow accepted one of the purparts of the land at the valuation of $20,000 and entered into recognizance to pay to all persons entitled thereto, their respective shares. She paid to each of the brothers and the sister living one fifth and to the children of each deceased brother as representing their fathers per stirpes one fifth. All parties believed at the time that the payments were in accord with the law of descent; all were ignorant that the two uncles and aunt were entitled to the whole and the nephews and nieces to nothing. All on receiving the money executed releases to the widow. One of the surviving brothers having, after receiving the money and executing the release, died, his administrator discovered that instead of one fifth he had been entitled to one third and brought suit against the widow for the difference. When she set up the release, he sought to avoid it by showing mutual ignorance of the law of descent by all parties; each being of the belief that the children were entitled to the shares of their parents. There was no question but that at the time of the distribution all parties were ignorant of the law and that was the only fact on which the release could be treated as void. By sustaining it the surviving brothers and sister lost two fifths of the estate; by declaring it void the widow would have had to pay over again the two fifths paid to the nephews and nieces.

There was no serious hardship in the case; the estate remained in the family of the dead brother; his brothers and sister got a fraction less than the law allowed them; the nephews and nieces a fraction more. It was a case of ignorance of the law alone and this court declined to set aside the release. In the opinion, the court cites a number of authorities from the Supreme Court of the United States, as well as Story's Equity Jurisprudence in support of the rule, that mere ignorance of the law itself is no ground for relief in equity and concludes thus:

"We grant that, where there is a mistake of a clear, well established and well known principle of law, whether common or statute law (for in this respect we can conceive no difference), equity will lay hold of slight circumstances to raise a presumption that there has been some undue influence, imposition, mental imbecility, surprise or confidence abused, but it is obvious that, in such cases, the mistake itself is not the foundation of relief, but the relief is had on entirely independent grounds, so as not to impinge the general rule. We are therefore of the opinion that in no case is ignorance or mistake of the law, with a full knowledge of the facts, per se, a ground for equitable relief."

Justice ROGERS admits there are rare exceptions to the rule and we concede that the trend of decisions in our state has been to multiply the exceptions as witness: Heacock v. Fly, 14 Pa. 540; Peters v. Florence, 38 Pa. 194; Gross v. Leber, 47 Pa. 520; Whelen's Appeal, 70 Pa. 410; Goettel v. Sage, 117 Pa. 298; Wilson v. Ott, 173 Pa. 253, and perhaps others; but in each of the cases cited the relief granted was not based solely on the ground of ignorance of the law; but there were in addition circumstances of great hardship resulting from the ignorance, or, in addition to the mistake of law, facts pointing strongly towards fraud or undue influence, yet which would not have been so certainly established as to warrant setting aside the contract.

Notwithstanding the remarks of MCCOLLUM, C. J., in Wilson v. Ott, supra, the last case cited, tending to throw doubt on the continued existence of the rule in Good v. Herr, supra, yet it will be noticed he cites Good v. Herr and distinguishes it from the one before him. What he says in disparagement of the rule is based on an essay in the American Jurist, and was not necessary to a decision of the case before him and therefore to some extent is dicta. The case before him was a "hard" case in which if the contract had been enforced according to law the defendant would have been compelled to pay $4,000 for a title they did not get, a case of gross hardship clearly constituting it an exception to the rule; therefore no assault on the general rule was necessary. This is the Pennsylvania case on which appellant seems to most confidently rely. But nevertheless, we adhere to that rule as the law of this commonwealth that

is, "In no case is ignorance or mistake of the law with a full knowledge of the facts, per se a ground for equitable relief."

If the evidence shows, that in addition there would be great hardship in enforcing the contract made in ignorance of the law, equity may afford relief. But between the border of great hardship and actual fraud there are many contracts made in ignorance of the law; yet which result in no inequitable consequences from the enforcement of the general rule. In such cases the rule should be enforced. The principle of the inviolability of contracts made with a full knowledge of the facts, and where there has been no overreaching or serious injury, should not be disturbed for slight reasons. There are very few cases where the title of a grantee of land has failed that the failure is not the result of ignorance of law by the grantee or of his counsel; the ignorance may only be demonstrated in a subsequent judicial trial, yet the legal theory is, that the law as announced at the trial was always the law though its first promulgation may have been only at that particular trial.

But a case directly in point is decided by the Supreme Court of California reported in 20 Cal. 637, and in 81 Amer. Decisions, 137, Kenyon v. Welty. In this case a contract was entered into by both parties under the belief that the law had been established by a decision of the Supreme Court made some time before. Clearly, both parties entered into the contract under the view of the law as announced by the Supreme Court. Sometime after, the court overruled its decision in the first case, and an action was brought to set aside the agreement on the ground that it had been made because of a mutual mistake of law. The court refused to disturb the contract saying: "Indeed the weight of authority in the United States is, that mistakes (of law), unless accompanied with special circumstances, such as misrepresentation, undue influence or misplaced confidence, constitute no ground for relief."

In the case before us there was no new law announced relating to contracts, in Palairet v. Snyder, supra, of which plaintiff might easily have been ignorant. That case only announces a law old as English law, that is, that where the grantee of land by deed covenants to pay annually forever an

annual rental of a certain sum of money, unless, within ten years he pays the full purchase money for the land, and he fails to pay the purchase money within the ten years, the annual rental becomes perpetual. It only promulgates the old law that parties are bound by their contracts; it would have been new law if this court had decided they were not. This, however, was the law of which plaintiff was ignorant; by reason of his ignorance, in an agreement under seal, he made a reduction of one per cent in the annual rental because he believed if the reduction was not made defendants would pay the principal; the only reasonable inference is, because his investment at five per cent was better than he could get elsewhere. No misrepresentation as to the law was made to him by anybody; law books and lawyers were thick around him but he did not take the trouble to inquire; he was induced to enter into the bargain because of its profit to him. It is just as profitable now, for while the legal rate of interest is six per cent, the commercial rate is five or less. As he avers, the ignorance of the law was mutual; if plaintiff had not entered into the agreement, defendants, in equity and good conscience, could then and there have paid off and extinguished the ground rent; by their mistake that opportunity was lost; by his mistake he has lost nothing that he expected to make by the bargain. We can see no hardship in this contract which should move a chancellor to reach forth his hand and destroy it.

As to the question of want of consideration, the plaintiff suffers no hardship from his contract which will move equity to rescind it; the contract then is in full force; it met the approval of plaintiff when he signed it; he got the consideration he demanded. The seal imports a consideration; on its face the contract expresses one; therefore, as long as equity refuses to abrogate it, it must be taken to be what it purports to be, a good contract in law.

The decree of the court below is affirmed and the appeal is dismissed at costs of appellant.

Raleigh's Estate.

Wills—Vested and contingent estates—Construction.

Where persons who are to take under a will must be living at a certain time, the gift is contingent because until the time arrives the persons who will answer to the description cannot be ascertained.

Testator who was largely in debt directed by his will as follows : "I do hereby direct that after my business is closed up and all my debts paid, there shall be paid to my wife by my executors an annuity of $2,400, for and during all the term of her natural life ; the balance of the income of my estate, from whatever source, to be equally divided between my six children, share and share alike, until the death of my wife. In case of the death of one or more of my children, without any lawful heirs, their portion shall be equally divided among the others. If any lawful heir or heirs, they to receive said amount annually, the same as their parents would have had if living . . . . It is my will and I do hereby direct that upon the death of my wife, my executors shall divide my entire estate into as many equal portions as I shall have children living, or that should be represented by lawful heirs, and make a plain and clear statement of the division, describing the properties and numbering each lot or share, and have them of as near equal value as possible, then make the distribution as follows, viz. : Give the youngest child her choice of shares, and so on with those living according to age, and following with the lawful heirs of any deceased child or children, if any such there be, my executors to represent their interest and to choose for them." *Held*, that the children took contingent interests.

Will—Power to sell—Conversion—Purpose.

Where a testator authorizes his executors to sell real estate for the payment of debts, any proceeds of such sale remaining after payment of debts is to be treated as real estate, and distributed as such.

Will—Devise—Heirs—Widow of son.

A gift of real estate to the heirs of a son does not include the widow of the son.

Argued Jan. 29, 1903. Appeal, No. 229, Jan. T., 1903, by Mary F. Kelly Raleigh, from decree of O. C. Phila. Co., July T., 1882, No. 34, dismissing exceptions to adjudication in estate of Maurice Raleigh, deceased. Before MITCHELL, DEAN, BROWN, MESTREZAT and POTTER, JJ. Affirmed.

Exceptions to adjudication.

The material portion of the will of Maurice Raleigh was as follows :

"(2) Item. I give and bequeath unto my beloved wife Bridget Raleigh during her life, the house in which we at present reside, No. 1617 N. 5th street, together with all household goods, furniture, books, wearing apparel, pictures, etc., contained therein.

"Also the house next door, No. 1619 N. 5th street, taxes, water, rents, interest on mortgage and repairs of both properties to be paid out of my estate, and at her death they revert to and become part of my estate.

"(3) Item. I do hereby order and direct my executors to pay over to my wife one hundred dollars ($100) per month, and to each of my children twenty-five dollars per month until all my debts shall be paid and business settled up.

"(4) Item. If it should seem necessary at any time to dispose of a portion of my real estate for the payment of my debts, I hereby give my executors power so to do at either public or private sale.

"(5) Item. I do hereby order and direct my executors to carry out all agreements I may have entered into, leases, etc., the same as I should have done if living, and to exercise their own judgment in reletting and making sales when it would seem wise and prudent so to do, and reinvesting in such securities as the laws of Pennsylvania would require.

"(6) Item. It is my will and I do hereby direct that the business shall be continued by my executors, for the benefit of my estate, until the expiration of the year in which my death occurs.

"(7) Item. It is my will and I do hereby direct, that after my business is closed up and all my debts paid, there shall be paid to my wife by my executors, in the place of one hundred dollars per month, an annuity of twenty-four hundred dollars ($2,400.00/100), for and during all the term of her natural life; and the balance of the income of my estate from whatever source to be equally divided between my six children, viz: James, Walter, Mary, Martha, Aggie and Kate, share and share alike—until the death of my wife. In case of the death of one or more of my children without any lawful heirs, their portion shall be equally divided among the others. If any lawful heir or heirs they to receive said amount annually the same as their parents would have had if living; I

desire these payments to my wife and children should be made monthly.

"(8) Item. It is my will, and I do hereby direct, that upon the death of my wife, my executors shall divide my entire estate into as many equal proportions as I shall have children living or that should be represented by lawful heirs and make a plain and clear statement of the division, describing the properties and numbering each lot or share and have them of as near equal value as possible, then make the distribution as follows, viz: Give the youngest child her choice of shares, and so on, with those living, according to age, and following with the lawful heirs of any deceased child or children, if any such there be, my executors to represent their interest and to choose for them.

"(12) Item. My executors shall have the power to sell my real estate from time to time as it shall seem wise and prudent so to do, and invest the net proceeds in such securities as the laws of the state of Pennsylvania require."

By a codicil testator directed as follows:

"It is my will and I hereby direct that my said executors, B. Lobenthal and Thomas W. Dell, shall continue the business of M. Raleigh & Co. under the same firm name for the benefit of my estate as long as they may think prudent and beneficial to the estate, and should they deem it prudent at any time to dispose of a portion of my real estate or to realize upon any securities they may hold in order to place themselves in funds for the successful prosecution of the business they shall have full power to do so without an order from the court."

One son, James Raleigh, died in the lifetime of the widow, leaving surviving a widow and child. The questions were whether the son took a vested interest and, if he did, whether his widow was entitled to share therein as an heir.

The auditing judge refused the claim of the widow of James Raleigh.

Exceptions to the adjudication were dismissed in an opinion by ASHMAN, J., in which HANNA, P. J., concurred and from which PENROSE and FERGUSON, JJ., dissented.

Errors assigned were in dismissing exceptions to adjudication.

Henry J. Scott, for appellant.—The intestate, James Raleigh, had a vested estate, to which his widow, as well as his child, both succeeded as his heirs upon his death: Duffield v. Duffield, 1 Dow. & Clark, 395; McClure's App., 72 Pa. 414; Richardson's App., 19 W. N. C. 175; Womrath v. McCormick, 51 Pa. 504; Little's App., 117 Pa. 14; Patterson v. Hawthorn, 12 S. & R. 112; Laguerenne's Est., 12 W. N. C. 110; Bloodgood's Est., 8 Pa. C. C. Rep. 546; Crawford v. Ford, 7 W. N. C. 532; Thomman's Est., 161 Pa. 444.

There has been a conversion of the realty into personalty: Thomas's App., 167 Pa. 536; Lackey's Est., 149 Pa. 7; Page's Est., 75 Pa. 87; Bender v. Luckenbach, 162 Pa. 18; Longwell v. Bentley, 23 Pa. 99; Darlington v. Darlington, 160 Pa. 65; Marshall's Est., 147 Pa. 77.

The exceptant, widow of James Raleigh, intestate, is his heir, together with his child, both as to his realty as well as his personalty: Potter's Est., 13 Phila. 318; Bloodgood's Est., 8 Pa. C. C. Rep. 546; Cote's App., 79 Pa. 235; Clark v. Scott, 67 Pa. 446.

Samuel Wakeling, for appellees.—The estates were contingent in the children: Lumberman's Nat. Bank's App., 13 W. N. C. 191; Barger's App., 100 Pa. 239; Weilly's Est., 200 Pa. 288.

There was no conversion: Chew v. Nicklin, 45 Pa. 87; Edwards's App., 47 Pa. 153; Hunt's App., 105 Pa. 128; Yerkes v. Yerkes, 200 Pa. 419.

Opinion by Mr. Justice Potter, July 9, 1903:

Maurice Raleigh died at Philadelphia, January 10, 1882, testate, and leaving to survive him a widow, Bridget Raleigh, and six children. He was indebted to various creditors to an amount exceeding $360,000.

James Raleigh, a son of the testator, died intestate September 26, 1896, leaving a widow, Mary F. Kelly Raleigh (the appellant) and one child, Martha Raleigh, of whose estate the Commonwealth Title, Insurance & Trust Company was appointed guardian. The debts of the decedent were fully paid at the date of October 1, 1900. Bridget Raleigh, the widow of the testator, died July 6, 1901.

By his will dated March 30, 1879, and duly probated at Philadelphia on January 17, 1882, Maurice Raleigh devised and bequeathed unto his wife, Bridget, the premises at 1617 and 1619 North Fifth street, Philadelphia, with his household goods for life, and directed his executors to pay her the sum of $100 per month until such time as his indebtedness should be discharged and his business settled; and to each of his children $25.00 per month during such period, and after the payment of his debts and the closing of his business he directed that his widow should have an annuity of $2,400 during her life, and that the balance of the income, during her life, should be equally divided between his children. In case any of them died without heirs, then to the survivors, thus indicating the exclusion of collaterals. If any lawful heirs, they were to receive the share that their parents would have taken if living.

He further directed that upon the death of his wife, his executors should divide his entire estate into as many equal proportions as he should have children living, or that should be represented by lawful heirs, and that his executors should make a plain and clear statement of the division, describing the properties and numbering each lot, or share, which should be made as nearly equal in value as possible. The executors were then to make distribution by giving the youngest child her choice of shares, and so on with those living, according to age; following with the lawful heirs of any deceased child or children, if any such, the executors of the testator to represent their interest and choose for them.

He appointed Bernard Loebenthal and Thomas W. Dell as executors and trustees, to whom letters testamentary were granted, and who acted as trustees under the will. Prior to the death of the widow, the executors filed ten accounts, but no distribution of the principal was made. The eleventh account was filed September 30, 1901, and showed balances both of principal and income in the hands of accountants.

Upon the audit, the appellant, as widow of James Raleigh, claimed that her husband, at the date of his death in 1896, was entitled to a vested interest in his father's estate, which should be awarded to his administrator when appointed; and also that she was entitled to share in the income of the estate, since

her husband's death. The auditing judge disallowed both of these claims, holding that the estate given to James Raleigh was not vested, but was contingent on his surviving his mother, and that the income was to be distributed as real estate (having accrued from the proceeds of sales of real estate made under the powers in the will); that there had been no conversion and therefore the widow, not being an heir of her husband, could not share in the distribution.

The appellant excepted to the adjudication and upon argument before the court in banc, the judges were equally divided in opinion. The exceptions were accordingly dismissed and the adjudication confirmed. The questions involved are:

1. Whether James Raleigh took a vested estate under the will of his father?

2. Whether under the will of Maurice Raleigh, the widow of James Raleigh was entitled after her husband's death, to share in the distribution of income as one of his lawful heirs?

The testator evidently appreciated the fact that a large indebtedness existed, which would require careful management, and some time to discharge without detriment to his estate. He, therefore, made specific pecuniary provision to a limited amount for the maintenance of his wife and children during that period. After it had elapsed, and the debts were paid, the amounts to be paid the wife and children were increased, but they still bore the impress of distinct specific gifts. In so far as the son James is concerned, the gift of income to him was for the life of the widow, if he outlived her; if he did not, his lawful heir was to receive the same amount annually which he would have received if living.

The intention of the testator in this respect is clear. In like manner, upon the death of his wife, the testator provided that in the distribution of the corpus of his estate, the heir should be substituted for the parent, in case any of the testator's children were not then living, and the right of choice in the division of the properties was expressly bestowed upon the heir. How can the right of the heir to succeed to the share of the parent in the income during the life of the testator's wife, and the equally clear right of the heir to a choice of the real estate, at the period of its distribution, be reconciled with the theory that the interest of the son was a vested one? His interest

was not one for his life, but its character depended upon his outliving the widow. His share both in income and in principal, was contingent upon that event.

We regard the provision that in case of the death of a child, his heir should be substituted to the parent's share of the income during the life of the widow, and should also exercise the right of choice, in the after distribution of the principal of the estate, as annexing the condition of time to the substance as well as to the payment of the gift. It could only go to the beneficiary living at the time of distribution.

In Rudy's Estate, 185 Pa. 359, a remainder, after the death of the testator's widow, to children, naming them, "if they be living or the issue of such of them as may then be deceased," was held to be contingent. In the opinion of Judge ASHMAN, approved by this court, it is said, on page 360: "In Pennsylvania the rule is well established that where persons who are to take must be living at a certain time, the gift is contingent, because until the time arrives, the persons who will answer to that description cannot be ascertained. Hence a gift 'to such of his children as might then be living' (McBride v. Smyth, 54 Pa. 245), or to a child for life and after her death 'to all her children then living' (Buzby's Appeal, 61 Pa. 111; Delbert's Appeal, 83 Pa. 462), has been esteemed contingent. It is difficult—perhaps it is better to say impossible—to harmonize the latter cases with Crawford v. Ford, 7 W. N. C. 532, and Laguerenne's Estate, 12 W. N. C. 110, where the gift at the end of the life estate was to 'all my children who shall be then living and the lawful issue of such as shall be dead;' or Manderson v. Lukens, 23 Pa. 31, to 'be equally divided among his children which should be then alive;' and Womrath v. McCormick, 51 Pa. 504, where the estate was to 'be divided into as many parts as testator should then have children living and be given to his living children and the issue of those dead,' in all of which cases the estates were held to be vested." See also Martin's Estate, 185 Pa. 51.

Mr. Justice SHARSWOOD says in Provenchere's Appeal, 67 Pa. 463: "There are no arbitrary or unbending rules in the construction of the words of a will. No two wills are in all respects alike. Where indeed the same precise form of expression occurs as may have been the subject of some former adjudica-

tion, unaffected by any indication of a different intention in other parts of the instrument, the courts, with a view to certainty and stability of titles, will follow the precedent. Counsel can thus be enabled to advise with confidence. Nevertheless the cardinal canon still holds good, that the intention of the testator of each will separately is to be gathered from its four corners. Hence almost every general rule has its recognized special exceptions, with exceptions to such exceptions which bring us back to the general rule again, and this may be and sometimes has been carried further in the vain attempt to generalize and classify all the decisions upon this most difficult and doubtful subject—the ascertainment of the intention from the words of a man, who in many cases had no intention at all, the question not being present in his mind at the time the words were used. These remarks are particularly applicable to the controversies which have arisen as to whether the future legacies give present vested or contingent interests. The determinations are very numerous—not always reconcilable—and in the nature of the subject this was inevitable. Vice Chancellor Sir Launcelot Shadwell has remarked very justly: 'The question is one of substance and not of form. The question in all cases has been whether the testator intended it as a condition precedent that the legatee should survive the time appointed by him for the payment of their legacies, and the answer to this question has been sought for out of the whole will and not in particular expressions:' Leeming v. Sherratt, 2 Hare, 14."

In the present case there was no gift of any part of the testator's estate (except legacies of $100 a month to his widow and $25 a month to each of his children) "until all my debts shall be paid and business settled up," or as he puts it again, "after my business is closed up and all my debts paid." The earliest point of time, therefore, at which it could possibly be held that the legacy to James Raleigh of a distributive share in the estate, could take effect would be the date of the final closing up of the business and payment of testator's debts. This date was October 1, 1900. But James Raleigh died September 26, 1896, long before that date. Therefore no interest in the share of the estate bequeathed to him ever became vested in him.

He was not even a life tenant; his interest was only that of a monthly legatee until the debts were paid. As he died before that was done, the share of income which had gone to him, passed to his child as a new object of bounty, until the death of testator's widow, after which the child took one sixth of the corpus. This was the manifest intent as shown in the will. We do not regard this case as one of a clear life estate to the widow, with remainder to the children, free from conditions as to the period of vesting and time of enjoyment. The will created an active trust to operate through two specific periods of time, before there could be any vesting, or any ascertainment of the parties who would take the corpus of the estate.

The remaining question, as to the right of appellant to share in the income, depends upon whether there was a conversion of the real estate under the will.

That there was no conversion effected by the will, is clear, from the doctrine of Oliver's Estate, 199 Pa. 509, and Yerkes v. Yerkes, 200 Pa. 419, and the later case of Sauerbier's Estate, 202 Pa. 187, where the authorities are considered at length in a learned opinion by Judge BLAND, affirmed by this court.

There being no conversion, the income was the proceeds of real estate and distributable as such. The gifts to the "heirs" of James Raleigh did not include his widow: Dodge's Appeal, 106 Pa. 216; Lesieur's Estate, 205 Pa. 119.

The assignments of error are overruled and the decree of the court below is affirmed.

Baldwin, Appellant, *v.* Urner.

Negligence—Master and servant—Elevator.

An employer is not held up to the very highest standard of care; only to reasonable care in view of the circumstance.

In an action to recover damages for injuries to a boy eighteen years old, it appeared that the plaintiff was employed by defendant to work at some knitting machines in a room through the floor of which an elevator passed. When the elevator was lifted to the floor two doors opened automatically and rested against upright posts, one on each side of the elevator shaft. When the cage descended the automatic doors closed, and formed part of the floor. One of the upright posts was next to the wall of the building,

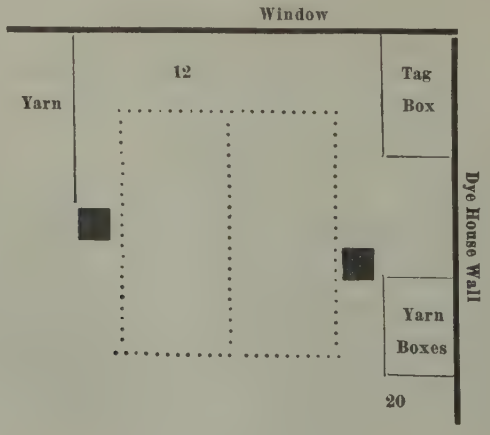
and the space between the elevator shaft and this wall was about twenty inches. A box containing tags stood in the corner of the room behind the elevator doors. Some boxes stood in the twenty inch space, not obstructing it entirely, they were placed there by fellow workmen of the plaintiff. At a time when the automatic doors were down, plaintiff walked over them, took some tags from the box, and as he turned to go back the doors rose, and his leg was caught between the door and the post. It was part of plaintiff's work to supply himself with tags from the box, and he well knew the doors and of their method of action. Instead of going over the closed doors he could have gone along an aisle into which the twenty inch passage opened, and have got to the tag box by pulling the other boxes out into the aisle. Plaintiff had worked in the room where he was injured for about three months at different times. *Held*, that there was no error in entering a compulsory nonsuit.

Argued Feb. 3, 1903. Appeal, No. 359, Jan. T., 1902, by plaintiff, from order of C. P. Montgomery Co., March T., 1901, No. 9, refusing to take off nonsuit in case of Harry M. Baldwin by his father and next friend, William H. Baldwin, v. W. C. Urner, trading as W. C. Urner & Company. Before MITCHELL, DEAN, BROWN, MESTREZAT and POTTER, JJ. Affirmed.

Trespass to recover damages for personal injuries. Before SWARTZ, P. J.

The circumstances of the accident are fully stated in the opinion of the Supreme Court.

The locality of the accident is indicated by the following plan:



The court entered a compulsory nonsuit which it subsequently refused to take off.

Error assigned was in refusing to take off nonsuit.

Henry Freedly, with him *E. L. Hallam*, for appellant, cited: Patterson v. R. R. Co., 76 Pa. 389; Bennett v. Glass Co., 158 Pa. 120; Brislin v. Coal Co., 20 Pa. Superior Ct. 234; Kehler v. Schwenk, 144 Pa. 348; Rummell v. Dilworth, 111 Pa. 343.

Louis M. Childs, for appellee, cited: Payne v. Reese, 100 Pa. 301; Ship Building Works v. Nuttal, 119 Pa. 149; Ford v. Anderson, 139 Pa. 261; Fick v. Jackson, 3 Pa. Superior Ct. 378; Coal Co. v. Hayes, 128 Pa. 294; O'Keefe v. Thorn, 24 W. N. C. 379; Kaufhold v. Arnold, 163 Pa. 269; Brossman v. R R. Co., 113 Pa. 490; Coal Co. v. McEnery, 91 Pa. 185; Wanamaker v. Burke, 111 Pa. 423; Boyd v. Harris, 176 Pa. 484; Nuss v. Rafsnyder, 178 Pa. 397; Wilkinson v. Mfg. Co., 198 Pa. 634; Knupp v. Rummel, 199 Pa. 90; Fick v. Jackson, 3 Pa. Superior Ct. 378; Kehler v. Schwenk, 144 Pa. 348; Nagle v. R. R. Co., 88 Pa. 35.

Opinion by Mr. Justice Dean, July 9, 1903:

The plaintiff, a minor eighteen years of age, was employed by defendants in their machine knitting factory. He attended ten machines and had done so for about one month before February 12, 1901. Sometime before his last employment he had served in the same way at the same machines for two months but had been changed to other work in another part of the mill and after an interval of two or three months was changed back to the same ten machines. On the day mentioned plaintiff met with a serious accident and is probably permanently injured. The circumstances under which it occurred and those tending to produce it, are correctly stated from the testimony by the learned judge of the court below as follows:

"A freight elevator was located in a corner of the factory building. When the cage of the elevator was lifted to the third floor two doors opened automatically and rested against upright posts, one on each side of the elevator shaft. When

the cage descended the automatic doors closed and formed part of the room floor. One of the upright posts against which an open door rested was next to the wall of the building and the space between the elevator shaft and this wall was about twenty inches. The space between the shaft and the other corner wall was about twelve inches. A box containing tags stood in the corner of the room behind the elevator doors. The twelve inch passageway was boarded up and some boxes standing in the twenty inch space prevented access to the tag box by that passageway.

"The twenty inch passageway between the elevator and the wall fronted on an aisle six feet wide. The yarn boxes which obstructed the passageway between the elevator and the wall did not extend into the aisle nor did they fill all the space between the elevator and the wall. There was no difficulty in pulling them out into the aisle along the wall and thereby give a passageway to the tag box. This was what was actually done at the time the plaintiff's limb was caught between the door and the upright post. These boxes stood between the elevator and the wall for 'quite a while.' It is not shown that the defendant placed them or ordered them placed in the passageway to the tag box. The only evidence upon this point indicates that the boxes were put there by the fellow workmen of the plaintiff.

"On February 12, 1901, the plaintiff walked over the elevator doors, took some tags from the box and as he turned to go back to his machines the cage raised the doors and caught his leg. The leg was fastened between the opened door and the upright post. It was necessary that the knitters should supply themselves with tags from the box and they were in the habit of crossing the elevator doors to reach the tag box. It was the only open way so long as the yarn boxes remained in the twenty-inch passageway or so long as the tag box remained in the corner of the building behind the elevator."

The court below, being of opinion there was no sufficient evidence of negligence on part of defendants, directed a nonsuit which it afterwards refused to take off and we have this appeal by plaintiff.

Appellant in substance assigns three errors:

1. It is averred that the employers failed in duty towards

plaintiff, in that they did not provide a reasonably safe place for him to work.

2. While plaintiff was at work they subjected him to wholly unnecessary danger.

3. Plaintiff being a young person his employers did not instruct him as to the dangerous character of his employment and as to the means of avoiding danger.

As to the first complaint, we have most carefully perused the testimony and can find nothing to sustain it. The immediate cause of the injury was the operation of the freight elevator which was used to raise raw material from the ground to the third floor where the machines were placed and to lower from that floor the finished product. It was properly constructed and operated and could not answer its purpose without an exit from below in the floor; automatically when it approached the floor the doors which at other times formed part of the floor, raised up and closed down again when the elevator descended. Plaintiff in his testimony says: "I got my tags and was returning and got about the middle of the doors when they raised under my feet, ... the doors slid me up against the post on that side." Here was machinery operating exactly as it was intended to operate, and which was reasonably necessary to the successful carrying on of the factory; the floor was entirely safe except in that particular spot, that is, on the doors where plaintiff was standing, and even there, except for the very few minutes when the elevator was ascending to that floor. Outside of the doors there was a safe passageway at all times not interfered with by the elevator and doors. Taking into view the nature of the work being carried on, the necessity of an elevator, that plaintiff was employed on the third floor, we think the employers furnished plaintiff with a reasonably safe place to work. There is no factory operated by machinery and hands in which more or less risk is not run by the employees working in such factory. The risk is only minimized by the very utmost care; it is not abolished. But the employer is not held up to the very highest standard of care; only to reasonable care in view of the circumstances. The highest standard of care here would have been to get rid of the elevator altogether and carry the material up and down stairs. It is argued that the elevator might have been located at an

opening in another part of the floor less used by the employees; this is possible, but if a fact, it does not prove that in view of its intended purpose it was not rightly located in that building; its proper location must be determined by the reasonable judgment of the manufacturer; unless the evidence showed a reckless indifference to the safety of employees his judgment must be taken in preference to that of the jury who had no special knowledge on the subject. There was no evidence by manufacturers or experts that the location was unreasonably dangerous.

As to the second complaint, that appellant in his work was subject to wholly unnecessary danger, it appears from the evidence, that in carrying on his work appellant had to go across the floor from his machines to yarn and tag boxes and that when injured he was returning from the tag box across the elevator doors to the machine with tags. Undoubtedly, there was more danger in stepping on the doors than on the floor outside; but appellant voluntarily stepped on the doors because that way was at the time most convenient to him; it is said the passageway at one side was obstructed by boxes; but the evidence is, that that place for the boxes was not designated by the employer; they were put there by employees, and could easily have been removed so as to leave the way open. No rule of law would impute this act of negligence by employees to their employer; he planned his place of work so as to leave an entirely safe passage; he planned the automatic doors so that there would be no dangerous opening at any time except when the elevator made its trip to the third floor; everything was done that reasonable prudence would dictate to lessen danger; the unnecessary danger was caused by the voluntary act of appellant in unnecessarily walking on the doors when there was an entirely safe way outside.

As to the third ground of complaint, that appellant being young was not properly instructed as to the danger of his employment, it will be noticed, appellant was not injured in the use of the knitting machines which he attended, therefore most of the authorities cited have no application. He was injured by the operation of outside independent machinery, an elevator operated by others: Kehler v. Schwenk 144 Pa. 348; Rummell v. Dilworth, 111 Pa. 343, and that line of cases aid us very

little in determining the application of the law to the facts before us. Plaintiff had worked at these same machines for two months, and then, after a short interval, for one month immediately before the accident. As is apparent from his own testimony, although a minor, he was bright and intelligent; he had seen the operation of this elevator, the raising and lowering of the doors many times; whatever danger there was, was just as obvious to him as to his employer or superintendent; a mere child would have understood that there was danger in being on those doors when the elevator was ascending; no possible instruction could have made that fact clearer to him than his own observation and experience had made it; it was not a latent danger of which he would not know unless informed; was not one which was only to be avoided by some special manipulation of machinery; the danger had only to be known to be avoided, as in O'Keefe v. Thorn, 24 W. N. C. 379, and Kaufhold v. Arnold, 163 Pa. 269. He knew when the doors were up it was dangerous to jump down the elevator shaft; he knew just as well that it was dangerous to be on the doors when the elevator was coming up. Therefore there was no duty on the part of the employer to give him instructions; certainly, not after his long observation had given him as full knowledge as possessed by his employer.

All the assignments of error are overruled and the judgment is affirmed.

Sherwood's Estate.

Orphans' Court—Orphans' Court practice.

Where an account filed in the Orphans' Court contains an item of distribution, and a person interested in the estate appends to the account a formal statement under seal that he has examined the account and prayed the court to confirm it absolutely as stated, such a person is estopped from subsequently taking an appeal on the ground of an error in the item of distribution in the account.

Orphans' Court—Orphans' Court practice—Bill of review—Appeal.

The statutory period for appeal from a decree of the Orphans' Court cannot be enlarged by a bill of review to correct an error of law which might have been the subject of appeal from the decree on the original account.

Decedent's estates—Distribution—Absent heir.

The rights of a son, as an heir of his mother, cannot be disregarded in the distribution of her estate, notwithstanding he has been absent and unheard of for more than twenty-nine years.

Argued Feb. 9, 1903. Appeal, No. 176, Jan. T., 1902, by Robert H. Sherwood, from decree of O. C. Bucks County, dismissing bill of review in estate of Isabella H. Sherwood, deceased. Before MITCHELL, DEAN, BROWN, MESTREZAT and POTTER, JJ. Affirmed.

Petition for bill of review.

YERKES, P. J., filed an opinion in which he stated the facts to be as follows:

The register of wills granted letters of administration upon the estate of Isabella H. Sherwood to Hon. B. F. Gilkeson in March, 1900. The following February Mr. Gilkeson filed his account and schedule of distribution. The heirs of Isabella H. Sherwood, if all living, are Henry F. Sherwood, Robert H. Sherwood and Catherine S. Jones.

On August 27, 1900, pursuant to proceedings taken before the register and continued in the Orphans' Court under the Act of June 24, 1885, P. L. 155, the court, having adjudged that the legal presumption of the death of Henry F. Sherwood, a son and heir of the decedent, was established, entered a decree directing the register of wills to issue letters of administration unto Benjamin F. Gilkeson upon the renunciation and request of Robert H. Sherwood and Catherine S. Jones, his only heirs, if he be dead.

The account of Mr. Gilkeson as administrator of the estate of Isabella H. Sherwood was approved by Robert H. Sherwood and Catherine S. Jones at the time of filing thereof, and contained a schedule of distribution annexed. It was approved by the court and confirmed finally April 26, 1901. Thereupon the administrator petitioned the court for a formal decree of distribution, in accordance with the schedule annexed to the account, which was duly entered and signed. By that distribution the one third or share of Henry F. Sherwood in the personal estate was awarded to Benjamin F. Gilkeson, as administrator, under his appointment by the proceedings pursuant to the act of 1885.

The petitioner has taken this rule to open the decree of distribution to Mr. Gilkeson as administrator of Henry F. Sherwood, averring that the sum distributed to Mr. Gilkeson should, in law, have been distributed between petitioner and his sister upon the presumption that Henry F. Sherwood, having been absent and unheard from for twenty-nine years, is in fact dead and therefore incapable of inheriting any part of his mother's estate. The administrator answers that the distribution was lawful, and assented to by the petitioner and his sister, that he has paid out a portion of the estate of Isabella H. Sherwood pursuant to said decree, to wit: the shares of the petitioner and his sister, and as administrator of Henry F. Sherwood has taken over and administered the share in the personal estate awarded to him, and has filed his account charging himself with the amount of the personal estate received from the estate of Isabella H. Sherwood, under the decree of this court, which account has become confirmed. That he has paid out the sum of $361.90 expenses of settling the estate, and claimed credit in said account for collateral inheritance tax amounting to $465.43, and has now in his hands without deducting the collateral inheritance tax, the sum of $9,308.77, or deducting said tax, the sum of $8,853.34, which sum he is prepared to pay out according to law, upon direction of the court, the same being upon deposit in the Bucks County Trust Company at two per cent interest.

He further answers that the sum of $1,496.78, proceeds of the real estate of Isabella H. Sherwood, and distributed to Henry F. Sherwood, if alive, if dead to his heirs or legal representatives, remains in his hands and has been separately deposited. It has not been distributed to, or accounted for by him as administrator of Henry F. Sherwood, but he suggests that, as administrator of Henry F. Sherwood, he is entitled to receive and distribute the said sum unless proof is made of the death of the said Henry F. Sherwood or security given. While as to this fund the respondent craves the instruction of the court, the application is not properly a part of this contention and should be made separately. The petitioner has obtained a rule to show cause why the account shall not be opened, as to the amount distributed to the administrator of Henry F. Sherwood, but has taken no steps as to the share of the real estate

distributed to his heirs or legal representatives. Therefore, so much of the answer is not responsive to the petition or rule.

At this time there must be shown some ground for granting a bill of review in this estate, other than a supposed hardship, which may affect the petitioners, growing out of the necessity of preserving the estate of Henry F. Sherwood or his heirs should they or some of them appear; for, although he is presumed dead, that presumption may be overcome or the right of the petitioner to this fund concluded at any moment by proof that he is living or that he left heirs living. He or they may appear and demand the estate.

The court entered a decree refusing the review.

Error assigned was the decree of the court.

Henry Lear, for appellant.

B. F. Gilkeson and *Richard C. Dale*, with them *Howard I. James*, for appellee.

Per Curiam, July 9, 1903:

The account which is appealed from contained an explicit item of distribution to the administrator of the estate of Henry F. Sherwood, which is now claimed to be error. To this account the appellant, together with the only other distributee except Henry Sherwood's administrator, appended a formal statement under seal that he had examined the account and prayed the court to confirm it absolutely as stated. It thus appears that he was instrumental in inducing the court to make the very decree of which he now complains. He has estopped himself from being heard to do so.

But irrespective of this point, the appeal is too late. The objection made is to the original decree, and no reasons are assigned for a review that were not available and should have been presented at the original hearing. It is not competent for a party to enlarge or renew the statutory period for appeal by a petition for a bill of review upon such grounds. While it may be conceded that the Orphans' Court might have entertained such a bill for the correction of a manifest error of fact, it is not clear that it could do so for an error of law which

might have been the subject of appeal, and certainly no case has been brought to our attention which holds that it must do so.

We have considered the Act of June 24, 1885, P. L. 155, in the case of Cunnius v. Reading School District, ante, p. 469, but the act has no bearing on the present case. Even if it were held unconstitutional under the fourteenth amendment to the constitution of the United States, the result would be that notwithstanding his absence Henry Sherwood's rights as an heir could not be disregarded in the distribution of his mother's estate.

Decree affirmed at the costs of appellant.

Cunnius *v.* Reading School District, Appellant.

Constitutional law—Control of property by state—Presumption—Property of absentee—Administrators—Act of June 24, 1885, *P. L.* 155.

The regulation of the title and devolution of property within its limits is within the control and jurisdiction of the state.

The rules of evidence for the judicial ascertainment of facts in its courts, and as a corollary, the establishment of legal presumptions, are also within the control and jurisdiction of the state.

The state is not bound to have the regular and lawful use and ownership of property subject to the whim of an individual in absenting himself indefinitely or for a very long period of time from the state.

The Act of June 24, 1885, P. L. 155, entitled "An act relating to the grant of letters of administration upon the estates of persons, presumed to be dead, by reason of long absence from their former domicile," is constitutional.

The appointment of an administrator under the Act of June 24, 1885, P. L 155, is a judicial act by a competent tribunal having jurisdiction of the subject-matter, and therefore cannot be attacked collaterally, but is valid until revoked by direct proceedings as prescribed in the statute.

As the proceedings under the act of 1885 are substantially in rem, for the conservation of property within the jurisdiction of the state, they are due process of law, and the act is constitutional.

Where the intent of a statute is plain, and its administration is committed to a court of known and established jurisdiction and methods under prior laws on similar subject-matters, such court is authorized to adapt its ordinary forms to the new requirements, or to devise and employ new ones of analogous kind suitable to carrying out the intent of the act. The orphans' court is such a court in regard to the act of June 24, 1885.

Argued March 2, 1903. Appeal, No. 351, Jan. T., 1902, by defendant, from judgment of Superior Court, Oct. T., 1901, No. 48, affirming judgment of C. P. Berks Co., Aug. T., 1899, No. 64, in case of Margaret Cunnius, now Margaret Smith, v, Reading School District. Before MITCHELL, DEAN, BROWN, MESTREZAT and POTTER, JJ. Reversed.

Appeal from Superior Court.

The facts appear by the opinion of the Supreme Court and by the report of the case, 21 Pa. Superior Ct. 340.

Error assigned was the judgment of the Superior Court.

Frederick W. Nicolls, for appellant.

Caleb J. Bieber, for appellee.

OPINION BY MR. JUSTICE MITCHELL, July 9, 1903:

The regulation of the title and devolution of property within its limits is within the control and jurisdiction of the state.

The rules of evidence for the judicial ascertainment of facts in its courts, and as a corollary, the establishment of legal presumptions, are also within the control and jurisdiction of the state.

Bearing these two axioms in mind let us examine the act of 1885 which is involved in the present case. It provides that whenever application shall be made for letters of administration on the estate of any person supposed to be dead on account of absence for seven or more years, the register of wills shall certify the application to the orphans' court, and that court, if satisfied that the applicant would be entitled to such letters were the supposed decedent in fact dead, shall cause advertisement to be made of the application, and on the day fixed shall "hear evidence concerning the alleged absence of the supposed decedent, and the circumstances and duration thereof." If upon such hearing the court shall be satisfied that the legal presumption of death is made out it shall so decree, and forthwith cause notice to be published in a newspaper of the proper county "and also when practicable in a newspaper published at or near the place beyond the common-

wealth where when last heard from, the supposed decedent had his residence." At the end of twelve weeks from the last insertion of this notice, if no contrary evidence be forthcoming, the court may order the register to issue the letters of administration, "and the said letters until revoked, and all acts done in pursuance thereof, and in reliance thereupon, shall be as valid as if the supposed decedent were really dead." It is further provided that the Orphans' Court may at any time revoke the letters on proof that the supposed decedent is in fact alive, whereupon the administrator shall file his account and turn over the property to the owner, who may also recover any moneys or property received by any person as widow, or next of kin, or heir. And for protection of the owner as to such persons it is required that no distribution shall be made to them until security is given approved by the court, for refunding with interest in case the supposed decedent shall in fact be alive, and in case of inability to give such security the money shall be invested under the control of the court, and the interest only paid to the distributee. Section 6 contains provisions as to suits by or against the administrator, and the substitution of the supposed decedent after revocation of the letters. This section will be referred to later on.

From this summary it appears that the act establishes a system, carefully wrought out with due regard to all rights involved, for the administration of estates or property whose owner is legally presumed to be dead, but whose death cannot at the time be proved with absolute certainty. It is a wise and just statute of sequestration and conservation of property which is without a known owner, whether the late owner has abandoned it (as in the present case) or the title has devolved upon others by his death, not being presently ascertainable. The statute steps in to provide a caretaker and to vest the present benefit in those who appear to be the owners, with as complete provision as is practicable for the re-establishment of the rights and possession of the absentee on his reappearance. That the state must have some such power is manifest. The property is within its jurisdiction and under its protection. It is not in the interests of order or good government that property should lie ownerless or open to conflicting claims. If the absentee be really dead it is conceded that the proceeding

is unimpeachable. But if he be dead, so far as can be learned, though death be not absolutely proved, yet the effect to the state is the same, there is property in its charge without a recognized owner. It must have power to meet such a case or one of its chief functions as a government must go unperformed.

The consequences of a different view are too serious to be disregarded. If an intruder enters on land of the absentee and holds open and hostile possession for twenty-one years, the absentee's title will be gone. So as to personal property of which another holds or acquires wrongful possession for six years. And in the meantime how is the heir or the next of kin, who so far as can be known is the real owner, to assert his right or prevent his title from slipping away before his eyes, unless he may rely upon the presumption? Unless the state can appoint a representative of the unknown owner, whether called administrator, curator or other name is immaterial, such owner's interests must go unprotected. And in appointing such representative the state must be allowed to act upon the presumption, for that is all that can be had in the case. Unless the statute in giving such authority clearly violates rights or transgresses constitutional restrictions, it is our duty to sustain it.

The Superior Court held the act unconstitutional as depriving plaintiff of her property without due process of law, under the fourteenth amendment of the constitution of the United States. In so holding the court felt itself bound by the decision of the Supreme Court of the United States in Scott v. McNeal, 154 U. S. 34.* If that case really governs the present we must, of course, render willing obedience to its supreme authority. But we do not so regard it. The exact point there decided was that a sale by an administrator appointed under a state law for a person who had been absent, unheard of, for seven years, but who was in fact alive, passed no title even to an innocent purchaser. The ground of the decision was that the probate court had no jurisdiction to appoint an administrator for a person who was alive, and there being no jurisdiction over the subject-matter, the appointment of an administrator

* Also reported in 14 Sup. Ct. Repr. 1108.—Reporter.

and all the acts done under such appointment were void. This is in entire accord with our own decision in Devlin v. Commonwealth, 101 Pa. 273, which is cited approvingly by Mr. Justice GRAY in his opinion. "The estate of a person supposed to be dead is not seized or taken into custody of the court of probate upon the filing of a petition for administration, but only after and under the order granting that petition; and the adjudication of that court is not upon the question whether he be living or dead, but only upon the question whether and to whom letters of administration shall issue. The local law on the subject . . . . does not appear to us to warrant the conclusion that the probate court is authorized to conclusively decide, as against a living person, that he is dead, and his estate, therefore, subject to be administered and disposed of by the probate court. On the contrary, that law, in its very terms, appears to us to recognize and assume the death of the owner to be a fundamental condition and prerequisite to the exercise by the probate court of jurisdiction to grant letters testamentary or of administration upon his estate." Id. p. 47. "Under such a statute, according to the overwhelming weight of authority as shown by the cases cited in the earlier part of this opinion, the jurisdiction of the court to which is committed the control and management of the estates of deceased persons, by whatever name it is called, ecclesiastical court, probate court, orphans' court, or court of the ordinary or surrogate, does not exist or take effect before death. All proceedings of such courts in the probate of wills and the granting of administrations depend upon the fact that he is dead, and are null and void if he is alive:" Id. 48. The cases referred to in this extract are numerous, but are founded on the same view that the essential jurisdictional fact for the action of the probate court is the death of the party whose estate is in question. This, as already said, is in exact conformity with our own case of Devlin v. Commonwealth, and with it we have no question.

But our act of 1885 is wholly different in intent and effect. It was passed less than three years after the decision in Devlin v. Commonwealth and is an effort to supply the remedy that such a state of facts as the present requires. Its primary purpose as appears from the preceding summary of its

provisions, is not distribution, but conservation of the estate, through the medium of an officer clothed with authority to protect and enforce the rights of the unknown owner, the absentee if alive, his legal successors if he be dead. The statute did not create the presumption of death, that we inherited with our common law. The probate court in Pennsylvania, in the sense in which it is understood in the cases previously referred to, is, for ordinary cases, the Register of Wills whose jurisdiction as held in Devlin v. Commonwealth depends on the fact of death. But when a case arises of presumption of death from absence, a question of fact is presented, which is essential to the determination of the rights in property whose owner is thus shown to be doubtful. Express jurisdiction is given by the act of 1885 to the Orphans' Court to inquire into and determine judicially that fact. This provision at once takes the case out of the ruling in Scott v. McNeal, and the line of authorities on the same principle, and puts it in the class of Allen v. Dundas, 3 T. R. 125, where payment to the executor in a forged will was held good, because the appointment of the executor was a judicial act by a competent tribunal within its jurisdiction, and though incorrect in fact, as subsequently shown, it was valid until regularly rescinded or reversed, and could not be attacked collaterally. The objection therefore that the court in the present case was without jurisdiction over the subject cannot be sustained.

We have still to consider whether the statute is open to further objection as not due process of law for want of personal service on the absentee. This depends on whether the proceedings under it are regarded as purely in personam or as at least quasi in rem. The leading authority on this point is Pennoyer v. Neff, 95 U. S. 714. It was there held that a general judgment against a nonresident obtained by constructive service by publication is void and a sale under it passes no title. But it was also clearly held that as to property within the jurisdiction of the state, judgments which are substantially directed against such property even though in form in personam, are valid to that extent. "It is true," says Mr. Justice Field, "that in a strict sense a proceeding in rem is one taken directly against property, and has for its object the disposition of the property without reference to the title of indi-

vidual claimants; but in a larger and more general sense the terms are applied to actions between parties where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage, or enforce a lien. So far as they affect property in the state they are substantially proceedings in rem in the broader sense which we have mentioned."

The proceedings under the act of 1885 conform fully to this standard. The primary object as already said, is the due and orderly conservation of property for the benefit of the unknown or uncertain owner; for present but restricted use by those who appear to be owners, with a saving of the rights of the former owner should it subsequently appear that he is the true owner still. If the statute had provided solely for the latter alternative, and vested a public administrator or other official with authority to collect and preserve the assets for the absentee exclusively, there could be no reasonable objection by the absentee for the whole proceeding would be in his interest. Thus in the present case plaintiff has a dower interest charged on land but if she had stayed away twenty-one years it would have been lost, for the statute of limitations would have barred a recovery notwithstanding her absence during that time. But the statutory administrator has been paid part of it, and so far as appears still has it in hand or secured for her benefit. That is in aid of her right and in no sense in violation of it. But there must be a limit beyond which the state is not bound to have its laws set at defiance by the whim of an individual, and property kept in abeyance as to its ownership. If a child having title to property is taken out of the state and never heard of again, it would be nearly a century before it could be said with certainty that such owner was dead. The state is not bound to have the regular and lawful use and ownership of property subject to such restrictions and uncertainty. If a fair and reasonable provision is made for protection of the owner in case of his reappearance the state has not exceeded its constitutional powers. Such provision as already shown is made by the act, under which no distribution can be made without security for reimbursement to the owner should he be shown to be alive. And the permissive use of the income or the property

itself in the meantime by those who upon the only evidence obtainable appear to be the actual present owners does not render the protection insufficient. Temporary use is a matter clearly within the state's power of regulation. The unreasonbleness of any other view may be illustrated by the present case. Appellant has paid the charge at least in part to the administrator who has the money in hand or secured awaiting plaintiff's claim, yet the latter without resorting to that fund, or proceeding under the statute, demands that defendant shall pay a second time for a mispayment which was plaintiff's own fault.

Returning for a moment to Pennoyer v. Neff, there is another suggestion applicable to the authority of the state. "We do not mean to assert," says Mr. Justice FIELD, "that a state may not authorize proceedings to determine the status of one of its citizens towards a nonresident, which would be binding within the state though made without service of process or personal notice to the nonresident." And this he illustrates by the case of divorce. But if the state has power to determine in this manner the status of its citizens as to whether married or not, it surely has equal power to determine the status of its citizens in respect to property, that of the absentee as to whether he is alive or dead, and that of the resident as to whether he is real owner or only next of kin.

One other consideration is applicable to the present case. The plaintiff was a citizen and resident of this state. She chose to disappear, leaving no trace for eleven years. She was bound to know the law. The state has power to make rules of property, and all owners are bound to conform and abide by them. It might treat absence for seven years as ipso facto an abandonment, and deal with it accordingly. The plaintiff legally knew that if she stayed away twenty-one years the statute of limitations would bar her claim against the defendant, and the reasons for her absence whatever they were would not stop that result; the act of 1885 was in force when she went away and she was equally bound to know that under its provisions the presumption of death might be established and acted upon. By staying away she should be held to have accepted the provisions of the act as a sufficient protection to her rights.

Section 6 of the act, as already mentioned, deals with the subject of suits by the administrator and against him as the representative of the supposed decedent. So far as it may be held to authorize a judgment which shall have the effect of a general judgment in personam against the latter, it may be obnoxious to the constitutional objection that it is not due process of law. It will be time enough to decide such questions when they arise. But even if so much of that section may be void it will not affect the general validity of the act.

Upon this branch of the case therefore we conclude, first that the appointment of an administrator was a judicial act by a competent tribunal having jurisdiction of the subject-matter, and therefore cannot be attacked collaterally, but is valid until revoked by direct proceedings as prescribed in the statute. And, secondly, that as the proceedings are substantially in rem, for the conservation of property within the jurisdiction of the state, they are due process of law and the act is constitutional.

The learned judge of the Common Pleas did not take the same view as the Superior Court upon the constitutionality of the act, but he held it to be ineffective by reason of certain defects or objections. The principal of these were, first, the failure to provide for a suitable bond to be given by the administrator, and therefore the impossibility of exacting security from him; secondly, the absence of provision for vacation of the administration and the carrying out of the testator's directions in case a will is found, whether made before or after the grant of letters; thirdly, the absence of provision for revocation of the administration except on "proof that the supposed decedent is in fact alive, i. e., at the date of the application for revocation;" fourthly, the provision for refunding bonds is only on the same contingency that the decedent shall in fact be alive; and lastly that the act furnishes no power or rule for adapting the practice prescribed by other general statutes in pari materia to the purposes of this one, or for devising new methods suitable to their accomplishment.

The difficulties thus pointed out are not insuperable, nor are any of them serious enough to invalidate the act. Where the intent of a statute is plain and its administration is committed to a court of known and established jurisdiction and methods

under prior laws on similar subject-matters, such court is authorized to adapt its ordinary forms to the new requirements, or to devise and employ new ones of analogous kind suitable to carrying out the intent of the act. The Orphans' Court is such a court in regard to this statute. It exercises jurisdiction over the general subject of decedents' estates and the testamentary and administrative agents in regard to them, and has very ample chancery powers in that regard. The intent of the act of 1885 is plain. When it speaks of an administrator it means an administrator under its own provisions and the bond and security to be given by him must be such as will conform to the intent. The court has full power to so modify the ordinary form of administrator's bond as to execute the intent of the act. Secondly, a will supersedes administration previously granted not merely because of the terms of the bond but by force of its superior authority, and there is no difficulty in applying the same principle under this act whether the will be made before or after the letters issued. In the same way any apparent difficulty in regard to revocation, and the taking of refunding bonds before distribution is easily obviated. The language of the act is that the court "may revoke the said letters at any time on due and satisfactory proof that the supposed decedent is in fact alive." The reasonable construction of this provision in order to carry out the plain purpose of the act is that revocation may (i. e. shall) be made at any time on proof that the supposed decedent is alive then, or was alive at any previous time which ought to work a revocation. Mere proof that he was alive at a subsequent date, whether a month, or a year, or more, later than the issue of letters, but had not been further heard of, might not make any such change of circumstances as to require revocation, while positive proof of his death would properly do so and lead to the issue of new letters in the ordinary course of administration. As already said none of these difficulties are insuperable, and the details may be safely left to be worked out practically as they arise. There are none of them presented in this case.

Judgment reversed and record remitted to the court of common pleas with directions to enter judgment for the defendant non obstante veredicto.

Stauffer, Appellant, *v.* Reading.

New trials—Discretion of court—Imposition of conditions.

The granting or refusing of a new trial except for causes like errors of law by the judge or misconduct of the jury, where it may be matter of right, is an exercise of judicial discretion by the court in furtherance of right and justice according to the circumstances of the case. Hence it is well settled that the court may impose terms upon either or both of the parties as conditions of the grant or refusal, and the latitude allowed to the discretion of the court to this end is very great.

Large as the discretion is, however, it is a judicial discretion and must be used with reference to the rights involved in the controversy. The condition imposed, therefore, must have some direct relation to the issue between the parties in the case.

In a proceeding to assess damages against a city for land taken for road purposes, the court cannot compel the plaintiff as an alternative to a new trial to convey to the city for park purposes three acres of his land cut off from the main body of his land by the road in question, neither party having asked for such conveyance.

Argued March 3, 1903. Appeal, No. 39, Jan. T., 1903, by plaintiff, from order of C. P. Berks Co., making absolute a rule for a new trial in case of A. K. Stauffer v. City of Reading. Before Mitchell, Dean, Brown, Mestrezat and Potter, JJ. Reversed.

Appeal from jury of view. Before Endlich, J.

From the record it appeared that the city of Reading appropriated one and one half acres of plaintiff's land for the purpose of a boulevard. The boulevard was so located as to cut off three acres of plaintiff's land to the north, leaving about seven acres to the south of the boulevard.

Verdict for plaintiff for $3,295.83.

On a rule for a new trial the court made the following order:

November 10, 1902. The rule to show cause is discharged, on condition that the plaintiff within thirty days from the date of the entry of this order convey to the defendant, for park purposes, the tract lying north of the boulevard; otherwise, upon the expiration of said period, the rule to become absolute.

Plaintiff appealed.

Errors assigned were (1) the order of the court as above, quoting it, and (2) making the rule absolute because of the failure of the plaintiff to comply with the order.

C. H. Ruhl, with him *Cyrus G. Derr*, for appellant, cited: Allen v. Sawyer, 2 P. & W. 325; Lehr v. Brodbeck, 192 Pa. 535.

Walter S. Young, city solicitor, for appellee, cited: Dougherty v. Andrews, 202 Pa. 633; Com. v. R. R. Co., 165 Pa. 44; Reno v. Schallenberger, 8 Pa. Superior Ct. 436.

Opinion by Mr. Justice Mitchell, July 9, 1903:

The granting or refusing of a new trial except for causes like errors of law by the judge or misconduct of the jury, where it may be matter of right, is an exercise of judicial discretion by the court in furtherance of right and justice according to the circumstances of the case. Hence it is well settled that the court may impose terms upon either or both of the parties as conditions of the grant or refusal, and the latitude allowed to the discretion of the court to this end is very great. As each case must be determined on its own circumstances the causes cannot all be specified or enumerated beforehand, but in general as is said by the most prominent writer on the subject, "it may be safely asserted that no case can occur presenting circumstances timely addressed to the discretion of the court, in which the rights of the parties may not be fully protected by the imposition of conditions meeting the exigency:" Graham on New Trials, 610.

Large as the discretion is however it is a judicial discretion and must be used with reference to the rights involved in the controversy. The conditions imposed therefore must have some direct relation to the issue between the parties in the case.

The condition complained of in the present proceeding transgresses this limit. The conveyance of the three acres was not asked for by the city nor offered by the appellant. Whatever its merits as a just or wise settlement between the parties, it was not apparently desired by either, and was certainly no part of the issue which they brought into court to have decided. In imposing it as a condition of the refusal of a new trial therefore, the court exceeded its discretionary authority.

The condition was erroneous also from another point of view as tending to deprive appellant of his property in violation of his right to have a jury pass upon its value. In this respect the case goes further than Lehr v. Brodbeck, 192 Pa. 535, where the jury having found a verdict for defendant contrary to the instructions of the judge, as to part of the goods sued for, the court directed the acceptance of an offer by the defendant to pay a sum less than plaintiff claimed, and on refusal of plaintiff to accept, refused a new trial. It was held that this was error. In the opinion our Brother DEAN said: "The plaintiff claimed that the value of her goods wrongfully seized and sold was $335. And whether this was the value or not, she had offered evidence tending to establish it as the value. As a suitor under the law she had a right to the opinion of the jury on the evidence; and the court at the trial thought so too. It however now directs her arbitrarily to strike from her claim $85.00 and as a penalty for refusal in effect says she shall have nothing." See also Bradwell v. Pittsburg, etc., Ry. Co., 139 Pa. 404.

Judgment reversed, and record remitted with directions to reinstate the rule for new trial and proceed to dispose of it according to law.

Culver to use *v.* Pocono Spring Water Ice Company, Appellant.

Mechanic's lien—Agreement not to file lien—Consideration.

An agreement by a subcontractor not to file a mechanic's lien is a sufficient consideration to support a promise on the part of the owner to pay the amount of the subcontractor's claim.

Corporation—Agent—Evidence.

Where a person has been in the habit of acting as the business agent of a corporation with its knowledge and without objection, actual authority may be inferred from his acts, and the company will be bound by them.

A corporation will be bound by an agreement relating to a building operation made by a person assuming to be its agent, where the evidence shows that such person was a large stockholder and director of the corporation, a member of its executive committee, its secretary and treasurer, and the person named in the building contract as the representative of the

company to whom reports were to be made by the building inspector, and to whom was given authority to approve or disapprove these reports, and who was apparently the general representative of the corporation.

Argued March 9, 1903. Appeal, No. 182, Jan. T., 1902, by defendant, from judgment of C. P. Monroe Co., Dec. T., 1899, No. 24, on verdict for plaintiff in case of M. B. Culver to use of Conrad Lee v. Pocono Spring Water Ice Company. Before MITCHELL, DEAN, BROWN and MESTREZAT, JJ. Affirmed.

Assumpsit for goods sold and delivered. Before FERRIS, J., of the eleventh judicial district, specially presiding.

The facts appear by the opinion of the Supreme Court.

Verdict and judgment for plaintiff for $1,834.24. Defendant appealed.

Error assigned among others was in refusing binding instructions for defendant.

Aaron Goldsmith, with him *A. R. Brittain*, for appellant.

Charles B. Staples, with him *John McGahren*, for appellee.

OPINION BY MR. JUSTICE BROWN, July 9, 1903:

On October 19, 1898, M. B. Culver entered into a written contract with the Pocono Spring Water Ice Company for the erection of a boarding house for its employees. The building was to be completed in all its parts and ready for use and occupation by December 15, 1898, and, if not completed by that time, there was a stipulation that the sum of $25.00 per day for the delay should be retained out of the money due as liquidated damages to the ice company, "and not by way of penalty." The boarding house was not completed in accordance with the contract until the following February. Lee, the use plaintiff, furnished the lumber to Culver for the erection of the building. The contract provided that neither the contractor nor any subcontractor should file a mechanic's lien. On January 24, 1899, Culver owed Lee $1,539.44 for the lumber that went into the building. Lee brought suit against the appellant for the recovery of this sum, on the ground that the

Ice Company had agreed to pay it to him, and, because it had so agreed to pay him, he did not file a mechanic's lien. Though there are twenty-two assignments of error, there are really but two questions involved in the case, and they are both of fact.

In submitting the case to the jury, the learned trial judge said that the alleged settlement made with Culver was the turning point in the case. This is all that is involved in the case, but it includes, at the same time, the question of the authority of Miller, who was acting for the company, to make the settlement upon which the appellee relies.

Culver testified that he had a settlement with Miller sometime after the completion of the building, and that, after the company had agreed to pay the claim of Isaac Stauffer and the sum due the appellee for the lumber furnished there still remained in its hands between $700 and $800 due to him. He states distinctly that the company agreed to pay the amount due to Lee, and in this he is corroborated by both Lee and the latter's son. At the time the company agreed to pay Lee, the time had not expired within which he might have filed his mechanic's lien; and he did not do so for the reason, as given by his son, George Lee, that "the Ice Company assumed our indebtedness, accepted the order given by Mr. Culver." To this the Ice Company replies that there was a stipulation in its contract with Culver that no mechanic's lien should be filed, either by a contractor or subcontractor; but there was testimony, that, before this agreement not to file a lien was signed, Culver had actually commenced work on the building, and, if so, that clause in the contract was not, under the act of assembly, binding upon him or any subcontractor furnishing material or labor. If Lee refrained from filing a lien in consequence of the company's promise to pay his claim, there was a sufficient consideration to support its promise to do so. Upon this point the court properly said: "The refraining by Mr. Lee from the filing of a mechanic's lien, and the consequent relief of the property of the company from a record lien against it, would be a benefit which the company had by reason of this settlement."

But the appellant insists that, even assuming Miller made the agreement testified to by Culver and Lee, he had no authority to do so. The question of his general authority to rep-

resent the company was submitted as a question of fact to the jury by the court after calling their attention to the testimony that he was a large stockholder and director of the company, a member of the executive committee, secretary and treasurer of the corporation, the person named in the building contract as the representative of the company, to whom reports were to be made by the building inspector, and to whom was given authority to approve or disapprove these reports, and that he apparently was the general representative of the corporation. Answer is made to this that his authority to settle with Culver was in writing and limited, and required him to exact in the settlement $25.00 per diem as damages for the delay in the completion of the building. The court properly charged the jury that his authority was limited by the resolution of February 11, 1899, but, inasmuch as there was no testimony that he had ever seen it, or had any knowledge of it, both he and Lee were fully justified in believing that he had general authority to act and make settlement for the company. In this the trial judge was manifestly correct, for if, as the testimony abundantly shows, Miller had been in the habit of acting as the business agent of the company, with its knowledge and without objection, actual authority might be inferred from his acts, and the company would be bound by them: Dougherty v. Hunter, 54 Pa. 380.

Whether the court properly interpreted the clause in the contract, providing for the payment of $25.00 per day for each day's delay in completing the building, to be a penalty that the company could not enforce, and that it is limited to the actual damages sustained by the delay, we need not determine, because the jury, by their verdict, have found that there was an agreement on its part to pay Lee the amount of his bill, and, under that finding, as against him, at least, it cannot assert any claim for damages or ask that any sum be deducted either as a penalty or as liquidated damages. No other questions fairly arise under the assignments of error. All are overruled and the judgment on the verdict is affirmed.

Yetter *v.* Delaware Valley Railroad Company, Appellants.

Equity—Equity practice—Equity rules—Master—Corporation—Elections.

Since the adoption of the new equity rules the court of common pleas has no power to appoint a master to conduct a corporate election if there is no decree ordering the election; and not even the consent of the parties can give it such power.

Corporations—Stock—Illegal issue of stock—Constitutional law—Constitution of Pennsylvania, article 16, *section* 7—*Act of May* 7, 1887, *P. L.* 94.

Under the Act of May 7, 1887, P. L. 94, which was passed to carry into effect section 7, article 16, of the constitution relating to the illegal increase of stock of a corporation, the remedy by proceedings on the part of the attorney general is exclusive, and no suit can be maintained by by stockholders against the corporation to declare stock invalid. The Act of May 4, 1893, P. L. 29, does not give stockholders any such power.

Argued March 10, 1903. Appeal, No. 44, Jan. T., 1903, by defendants, from decree of C. P. Monroe Co., Sept. T., 1902, No. 14, on bill in equity in case of Milton Yetter et al. v. Delaware Valley Railroad Company et al. Before MITCHELL, DEAN, BROWN and MESTREZAT, JJ. Reversed.

Bill in equity for the appointment of a master to conduct a corporate election, and to declare an issue of stock invalid. Before ALBRIGHT, P. J.

The facts are stated in the opinion of the Supreme Court.

Error assigned was the decree of the court.

A. Mitchell Palmer and *F. W. Edgar*, for appellant.—The appointment of a master to conduct a stockholders' election without notice to the holders of stock attacked and without any hearing or decree, was without authority: Palethorp v. Palethorp, 184 Pa. 585; Chester Traction Co. v. P. W. & B. R. R. Co., 180 Pa. 432; National Transit Co. v. United States Pipe Line Co., 180 Pa. 224; Com. v. Archbald, 195 Pa. 317.

Individual stockholders may not bring the action provided

for by the act of May 7, 1887, for violation of its terms: Columbia Nat. Bank's App., 16 W. N. C. 357; Shannon v. Stevenson, 173 Pa. 419.

Whether the corporate stock of a company has been properly increased in accordance with the constitution and the statutes is a question which the state alone can raise: Pullman v. Upton, 96 U. S. 328; Wood v. Corry Water-Works Co., 44 Fed. Repr. 146.

C. B. Staples, with him *W. B. Eilenberger*, for appellees.—The court had power to appoint a master: Jenkins v. Baxter, 160 Pa. 199; Transit Co. v. Pipe Line Co., 180 Pa. 224; Com. v. Archbald, 195 Pa. 317.

Opinion by Mr. Justice Brown, July 9, 1903:

The bill in this case was filed on August 29, 1902, and asked simply for the appointment of a master to conduct the annual election of directors by the stockholders of the Delaware Valley Railroad Company to be held on the following Monday, September 1. The allegations were that 5,000 shares of stock had been issued by the company in violation of the constitution and act of assembly, and that sixty-five shares constituted "all the stock legally issued and entitled to participate in the election for directors at the coming annual election." With no notice to the stockholders, whose right to vote was thus challenged, the court, on the day the bill was filed, appointed a master to conduct the election, and directed him to pass upon the legality of the issue of the stock. His decision "as to the propriety of counting" the vote was, according to the court's order, to be final. Not until he appeared at the time and place of holding the election and a copy of the bill and decree appointing him was served upon the president of the railroad company, did the stockholders, whose right to vote had been questioned, have any knowledge of his appointment. He conducted the election and passed upon the legality of the issue of the 5,000 shares of stock, and, having judicially determined that the issue was illegal, denied the holders of them the right to vote. The regularity of the master's appointment was promptly questioned in the court below, and, on this appeal, will first be disposed of, as it is the first question raised.

When the master was appointed the court below ought to have understood that our equity rules, having been adopted by the authority of an act of the legislature, have all the force and effect of a positive enactment, and that all proceedings not in conformity to them are irregular and void: Cassidy v. Knapp, 167 Pa. 305; and it ought to have been equally well understood at that time, from admonitions given, that no violation of the rules will be tolerated: Traction Co. et al. v. Phila., etc., R. R. Co., 180 Pa. 432; Palethorp v. Palethorp, 184 Pa. 585. It is true, counsel for the railroad company appeared and consented to the appointment of the master; but our rules of practice are not to be disregarded even by consent, and, even if they could, in the present case the attorney for the company had no authority to speak for the stockholders, who were the only parties directly affected by the court's order. Rule 60, as amended January 15, 1894, is, that "the office of master in chancery is hereby discontinued, except in proceedings where decrees or interlocutory orders are to be executed, or their execution supervised by an officer of the court." When the appointment of the master was asked for, there was no decree nor interlocutory order pending in the court to be executed. The court had not even ordered the election, but the same was about to take place, as a matter or course, in accordance with the charter or by-laws of the company. Without anything at all before it except the bill, the court at once granted the only prayer it contained by appointing a master to conduct the election, clothing him with judicial functions to pass upon the right of the challenged stockholders to vote. Instead of executing any interlocutory decree or order of the court, the master's commission was, that he himself should decree, in the first instance, at the election, whether the 5,000 shares of stock had been lawfully issued, and pass upon the right of the holders of them to vote. The court had exercised no judicial function whatever, except to appoint him. All the rest was left to him, in the first instance, by his summary appointment, with no notice to those who ought to have been heard. Before the adoption of our present rules the appointment under the circumstances would have been improper, and, since their adoption, it must be regarded as nothing less than a flagrant violation of them, which cannot be overlooked, even if, as is now contended by the ap-

pellees, no harm was done the appellants, in view of the court's subsequent finding that the issue of stock was illegal.

The prayer of the bill, as originally filed, was afterwards enlarged, and, as amended, asked for a decree that the 5,000 shares of stock had been illegally issued. The court passed upon that question as the fundamental and decisive one presented by the pleadings, and made the decree prayed for. In doing so, the learned trial judge said that he had not regarded the appointment of the master and his action as having any bearing upon the question or affecting the trial in any form whatever.

The second question raised on this appeal is as to the right of the appellees, as individual stockholders, to file this bill, the contention of the appellants being that the remedy provided by section 4 of the act of 1887, P. L. 94, is exclusive and must be pursued. In section 7 of article XVI of the constitution, it is declared that "no corporation shall issue stocks or bonds except for money, labor done, or money or property actually received; and all fictitious increase of stock or indebtedness shall be void." This section is not self-executing, and, to give it effect, the Act of May 7, 1887, P. L. 94, was passed. Its second and fourth sections are as follows: "Section 2. That no railroad corporation of this commonwealth, its directors, or officers, shall authorize or make any issue of its capital stock, when such issue is to be in payment for labor done or property received, until after the president of such company shall have filed, in the office of the secretary of the commonwealth, a statement showing in detail the prices paid or to be paid for the several kinds of labor done, and for the property received or to be received, accompanied with the oath or affirmation of himself, and of the chief engineer of said company that the prices, shown by such statement as paid for, the several kinds of labor done, and for the property received or to be received, were not in excess of the prices for which, at the time, the labor was done or the property contracted for, it could have been obtained for money paid, and that no certificate of stock has been or will be issued, in payment for such labor or property, for a larger amount than the actual cash value of the labor, or property, detailed in such statement." "Section 4. That upon complaint of any stock-

holder in any railroad company of this commonwealth, or of any two reputable citizens resident in the region traversed by the line of the railroad of such company, or the traffic of which will be affected by its construction, that the said company is about to issue, or has issued since the passage of this act, either stock or bonds, or other certificates of indebtedness, in contravention of the provisions of this act, or of section seven of article sixteen of the constitution (which complaint shall be in writing, verified by affidavit, and filed with the attorney general of this commonwealth), it shall be the duty of the said attorney general, at once, to institute proper proceedings at law, or in equity, or both, in the name of the commonwealth, to enforce the provisions of this act, and to restrain and prevent the company from consummating or continuing any act, or acts, so alleged to have been done, or to be contemplated, in violation of the terms of this act." The court below, having found as a fact that no certificate had been filed in the office of the secretary of the commonwealth previous to the issuing of the stock, as required by the second section of the act of 1887, concluded, as a matter of law, that the 5,000 shares had been illegally issued and were void.

No question is raised as to the power of the railroad company to issue the stock which the court below found had been illegally issued, but the complaint is made that it was not properly issued. Whether, independently of the fourth section of the act of 1887, if the stock was issued in contravention of the constitution and in violation of the statute, the commonwealth alone can complain, is a question not before us. We are to determine only whether, in view of the specific allegation of the complainants and the finding of the court that the stock has been illegally issued, because section 3 of the act of 1887 had not been complied with, any other remedy for the violation of that section can be pursued than the one pointed out in the act itself. Section 4 specifically points out the remedy for a violation of the provisions of section 3. The statutory requirement upon this subject is, "in all cases where a remedy is provided, or duty enjoined, or anything directed to be done by any act or acts of assembly of this commonwealth, the directions of the said acts shall be strictly pursued:" Act of March 21,

1809, sec. 13, 4 Sm. L. 326. This requirement applies to remedies in equity as well as at law: Brotzman's Appeal, 119 Pa. 645. It is, therefore, plain that the proceeding to declare the stock unlawful ought to have been at the instance of the attorney general when moved to act. This view would apparently have been entertained by the court below, if it were not for the Act of May 4, 1893, P. L. 29, which provides: "That the several courts of common pleas of this commonwealth having the powers of a court of chancery, shall have jurisdiction of all litigation and disputes between stockholders and parties claiming to be stockholders, and between creditors and stockholders and creditors and the corporation, of all corporations within this state; and in the proceedings before the court in such case, the service of process upon the company shall be held and considered as a service upon one of the principal defendants, as provided in the first section of the act of April sixth, one thousand eight hundred and fifty-nine, relating to equity jurisdiction and proceedings." The conclusion of the court was: "This case is within the provisions of said act of 1893. It is a dispute between stockholders and parties claiming to be stockholders." The manifest error of this is that the act of 1893 merely gives jurisdiction. It makes no change in the requirement in the act of 1887 as to who alone can act for a violation of its provisions. It is still the attorney general, and it may be that, in a proper proceeding by him, the common pleas of Monroe might have jurisdiction. But the question here is not one of jurisdiction. It is simply as to the parties who may act, and this bill, not having been filed by the proper one, should have been dismissed for that reason.

In view of the foregoing conclusions, the three remaining questions need not be considered. The decree of the court below is reversed and the bill is dismissed at the costs of the appellees, in which are included the costs of this appeal; and there having been no legal election of directors of the Delaware Valley Railroad Company on September 1, 1902, it is ordered, adjudged and decreed that the directors in office at that time be continued by the company until their successors are elected.

Dayton, Appellant, *v.* Carter.

Church law—Presbyterian church—Title to property—Trustees—Session.

In the Presbyterian church the legal title to church property is vested in the trustees of the congregation and not in the session. The function of the session is to exercise control over the spiritual affairs of the congregation, but not over its temporalities. The custody and care of the property pertain to the trustees, for the uses and purposes for which they hold the trust. Chief among these is the maintenance of public worship by the congregation; and in so far as that purpose is concerned, the trustees should respect the wishes and action of the session as to the use and occupation of the house of worship.

In the Presbyterian church a presbytery regularly convened at a stated meeting has the constitutional right to direct elders to cease acting without citing them to appear and be heard in their own behalf.

A meeting of a session for the election of elders is invalid where the pastor of the church was not present, and no one was appointed by him to preside. Such a meeting cannot invalidate the regular annual elections held at the proper time and place and called and conducted according to the custom of the congregation.

Argued March 18, 1903. Appeal, No. 21, Jan. T., 1903, by plaintiffs, from decree of C. P. Lycoming Co., Dec. T., 1900, No. 2, dismissing bill in equity in case of John E. Dayton et al. v. James Carter et al. Before MITCHELL, DEAN, FELL, BROWN and POTTER, JJ. Affirmed.

Bill in equity for an injunction. Refore MCCLURE, P. J., specially presiding.

The material averments of the bill and answer and the material facts are stated in the opinion of the Supreme Court.

Error assigned was decree dismissing the bill.

W. M. Stephens and *H. T. Ames*, of *Ames & Hammond*, for appellants.—In church organizations, those who adhere and submit to the regular order of the church, local and general, are the true congregation and corporation if incorporated. The title to the church property of a divided congregation is in that part of it which is acting in harmony with its own law

and the ecclesiastical laws, usages, customs and principles which were accepted among them before the dispute began, are the standards for determining which party is right: Winebrenner v. Colder, 43 Pa. 244; Schnorr's App., 67 Pa. 138; Krecker v. Shirey, 163 Pa. 534; Kerr v. Trego, 47 Pa. 292; St. Paul's Reformed Church v. Hower, 191 Pa. 306.

The test in this case is which part maintained the ecclesiastical organization of the denomination: Krecker v. Shirey, 163 Pa. 534–550.

All the members of the church are bound by the constitution and discipline of the church as well as all church tribunals: McAuley's App., 77 Pa. 397; Schlichter v. Keiter, 156 Pa. 119; Krecker v. Shirey, 163 Pa. 534.

The decree of a church judicatory is binding only upon all when it has acted within the scope of its authority and has observed its own organic forms and rules: Kerr's App., 89 Pa. 97.

The election of appellees at the church building by their adherents being illegal, they are not entitled to the possession and control of the church building for any purpose; Schlichter v. Keiter, 156 Pa. 119.

The decree of a church judicatory is binding only when it is affirmatively shown that it has acted within the scope of its authority and has observed its own organic forms and rules: Kerr's Appeal, 89 Pa. 97–112, 113.

John G. Reading, with him *John T. Fredericks*, for appellees. —The laws of the ecclesiastical body will be recognized and enforced by the civil courts when not in conflict with the constitution and laws of the state. A sufficient reason for this is that they have been made or assented to by the parties, who have agreed with each other by the act of uniting with the body to be governed by its laws and usages: Tuigg v. Treacy, 104 Pa. 493.

Upon questions arising under the discipline, as upon those arising under the articles of faith, the decisions of the ecclesiastical courts are ordinarily final, and they will be respected and enforced by the courts of law: German Reformed Church v. Seibert, 3 Pa. 282; O'Hara v. Stack, 90 Pa. 477; Schlichter v. Keiter, 156 Pa. 119.

OPINION BY MR. JUSTICE POTTER, July 9, 1903:

On October 13, 1900, John E. Dayton and seven others filed a bill in equity against Rev. James Carter and seven others.

The complainants alleged that they were the legal session, and elders elect, of the Presbyterian Church of the Covenant of Williamsport, Pa.; that the said church or congregation is in ecclesiastical connection with and is subject to the Form of Government and Discipline of that body of Christains known as the Presbyterian Church in the United States of America; that under the provisions of its fundamental law, there are four church judicatories; the session of each congregation or church, the presbytery, the synod, and the general assembly, having jurisdiction in the order given, and each higher judicatory having appellate jurisdiction over the inferior; that in 1844 the Second Presbyterian Church and Congregation of Williamsport was incorporated, to be under the watch and care of the then presbytery of Harrisburg, synod of Pennsylvania and general assembly of the Presbyterian Church in the United States of America; in 1897 the name of the said corporation was duly changed to the Presbyterian Church of the Covenant of Williamsport and for a long time past the said church has been attached to the Presbytery of Northumberland, Synod of Pennsylvania; that certain real estate in the city of Williamsport has been conveyed to the said church and a church building erected thereon with funds subscribed by members of this church and money realized from the sale of another lot of land belonging to the corporation; that on November 8, 1899, and prior thereto, the complainants with one Meyer, were the elders and elders elect of said church and, as such, moderated by Rev. James Carter, pastor of the church, constituted the legal session of the church; that, on May 22, 1899, the presbytery of Northumberland, which had assembled for the purpose of receiving and acting upon, the resignation of Rev. James Carter as pastor of said church without notice to and in the absence of complainants and in violation of their constitutional rights and of the Form of Government and Discipline of the Presbyterian Church, ordered complainants to cease to act as elders and directed the church to meet on May 31, for the election of a session, with the understanding that the present session

should continue to act until the newly elected session was properly constituted; that the complainants appealed to the synod of Pennsylvania which dismissed their complaint and recommended that the election of elders be held on November 8, 1899; that complainants then appealed to the general assembly, which in May, 1900, sustained the appeal and remanded the case to the synod with instructions to send it back to the presbytery, for reconsideration and action; that November 8, 1899, and April 4, 1900, at meetings which were illegally called and conducted, a portion of the membership of the church, attempted to elect the defendants, with the exception of Rev. James Carter, as ruling elders of the said church; that the pastor has ordained and installed the other defendants as elders and has called them to meet as a session, and moderated their alleged sessions; that the defendants have unlawfully assumed to act as the session of the said church and have conspired and colluded with other members of the church to refuse to recognize the complainants as a lawful session; and that by the action and conduct of the faction of the church who elected the defendants as elders, there was organized a new church and congregation which are in rebellion against the lawful authorities of the Presbyterian Church, and which have taken possession of the property of the church and have excluded complainants and their adherents therefrom, unless they will submit to the authority of defendants as the true and legal session of said church. The complainants prayed for an injunction restraining the defendants.

1. From acting as a session for the Church of the Covenant.

2. From doing anything to prevent members of the church from recognizing the plaintiffs as a legal session.

3. To command the defendants to surrender the church property to the plaintiffs as a legal session.

The defendants demurred to the bill, but the demurrer was overruled by the court (ARCHBALD, J., sitting specially).

The answer admitted that complainants, with L. I. Meyer, were the legal session of the church up to November 8, 1899, when, at a duly convened meeting of the members of the church, other persons were elected elders; and alleged that at that meeting and on April 4, 1900, the defendants, were legally elected elders of the said church, that they were the legal

session of the church and were not in rebellion to the authorities of the Presbyterian Church, and that on September 24, 1900, the presbytery had denied representation to the complainants and had recognized the defendants at the legal session of the church; on October 17, 1900, the synod had dismissed an appeal from this action and an appeal had been taken to the general assembly to be held in May, 1901. Defendants also averred that the courts of Pennsylvania had no jurisdiction of the subject-matter of the bill, so long as the ecclesiastical courts of the Presbyterian Church were considering the same.

Upon the trial it appeared that the Church of the Covenant observed the rotary or limited term system of electing elders, by which the elders were elected in groups annually in the month of April for terms of three years. In April, 1900, the terms of three of the complainants expired; in April, 1901, the terms of two others, and in April, 1902, the terms of the three remaining.

In April, 1900, and April, 1901, meetings of the congregation were held of which the customary notice was given by the pastor, and other persons than the complainants were elected to serve as elders. It further appeared that on December 12, 1900, and April 3, 1901, certain members of the congregation met at a place other than the church and re-elected the complainants as elders.

The court below (McClure, J., sitting specially) held that the action of the presbytery on May 22, 1899, ordering the complainants to cease to act as the session of the church was illegal and of no effect, but that the elections held in April, 1900, and April, 1901, were regular and valid, and those held by the complainants and their adherents, away from the church, were irregular and void. The court further held that, inasmuch as at the time of the final decree, January 3, 1903, the terms of all the complainants had expired and they had not been re-elected, they had no longer any standing to maintain their bill. The bill was therefore dismissed, but the defendants were required to pay the record costs.

From this decree the complainants appealed.

It is a serious question whether the court below had any jurisdiction in equity to try the real issue as disclosed by the allegations of the bill. While it is true that one of the prayers

in the bill seeks to compel the surrender of the property of the church to the plaintiffs, as the legal session, yet the real controversy is over the validity of the election of the defendants as elders of the church. If they were lawfully elected, they constitute the session, and the plaintiffs have no case and are not entitled to exercise such control of the property as is claimed. As a matter of fact, the legal title to the property is vested in the trustees of the congregation and not in the session. The function of the session is to exercise control over the spiritual affairs of the congregation, but not over its temporalities.

The custody and care of the property pertains to the trustees, for the uses and purposes for which they hold the trust. Chief among these is the maintenance of public worship by the congregation; and in so far as that purpose is concerned, the trustees should respect the wishes and action of the session as to the use and occupation of the house of worship.

We assume therefore that in this case, the complainants in seeking the control of the property, have in mind such control only as the session is entitled to exercise in supervising the spiritual interests of the congregation. The title of the plaintiffs to the office of elders is therefore the real question at issue. The legality of their own election as elders is asserted and that of the defendants is alleged to have been unlawful. The right of the session to control in any way the property of the congregation is only incidental to the right to the office of elder. But this court has decided that a bill in equity to compel the surrender of the property of a corporation cannot be sustained where it appears that the real question in controversy is the validity of the election of the defendants as officers of the corporation. In such a case quo warranto is the appropriate remedy: Bedford Springs Co. v. McKeen, 161 Pa. 639. In that case, Mr. Justice GREEN says on page 642: "In Conn. v. Graham, 64 Pa. 339, we held that quo warranto is the proper remedy against persons usurping the office of trustees of a chartered church. It was a proceeding to test the title of the whole board and turned upon the valitidy of their election."

And in Nolde's Appeal, 2 Mona. 169, 175, the principle is thus stated: "The question presented simply involves the determination of the right to the office and that question with-

out more (and there is nothing else here) cannot be determined by a bill for an injunction. The rule of law on this subject is that the right of an officer in a corporation will not be tried upon an application for an injunction, nor will one who has been wrongfully removed from such office be restored by injunction. A court of equity will not assume jurisdiction in such a contest, where there is nothing involved which calls for the intervention of equity: High on Injunctions, 781, 789; Hilliard on Injunctions, 403."

A bill in equity, praying an injunction, will not lie to determine which of two parties is entitled to the office of school director, or other public office; there is an adequate and exclusive remedy at law in such case by writ of quo warranto: Gilroy's Appeal, 100 Pa. 5; see also Goldsworthy v. Boyle, 175 Pa. 246, and Brower v. Kantner, 190 Pa. 182.

In overruling the demurrer in this case, the court below referred to Long v. Harvey, 177 Pa. 473, as authority for holding that the allegations of complainants that they were displaced from the eldership of the church in violation of the fundamental law of the general ecclesiastical body to which they belong, involving the loss of the control and management, not only of the spiritual affairs of the church, but to a certain extent of its property also, would, if sustained, be ground for equitable relief. But the lack of ground for exercising equitable jurisdiction does not seem to have been suggested or considered in that case. In the present controversy, when the demurrer was considered, there was of course no evidence before the court. In the testimony which has since been taken, nothing appears to show that any attempt was made to divert the church property from the use to which it was originally dedicated, or to exclude the complainants or their adherents from lawful participation in congregational government. The controversy is only as to which of the parties constitute the rightful session of this particular congregation. The question of jurisdiction was not, however, pressed in the argument, and the fact that the court below dismissed the bill, after a full consideration of the merits of the controversy, makes the inquiry into the jurisdictional facts of less importance.

In considering the merits, two questions arise concerning

the ecclesiastical legality or constitutionality of the action of the presbytery of Northumberland, in directing the session of the Church of the Covenant to cease acting when a new session has been elected and constituted.

1. Does a presbytery, regularly convened at a stated meeting, have the constitutional right to direct elders to cease acting without citing them to appear and be heard in their own behalf?

This question has been answered in the affirmative by the general assembly, on the authority of chapter 10, section 8, form of government: "Presbytery has power to visit particular churches . . . . and to order whatever pertains to their spiritual welfare." Under this section the right of the presbytery upon its own motion to direct an elder to cease to act, was upheld, and the trial court followed the ruling. See Moore's Digest, page 538.

2. Had this pro re nata meeting, called for a special purpose, the legal or constitutional authority for directing the complainants to cease acting?

Form of government, chapter 10, section 10, after stating how a special meeting is to be called, reads as follows: "Nothing shall be transacted at such special meeting besides the particular business for which the judicatory has been thus convened." The call for this particular meeting has two specifications, viz: first, "to receive the resignation of the Rev. James Carter;" second, "to take such action as may be deemed advisable in the premises."

The real constitutional question is this: Was the direction of the presbytery that the session should cease acting so vitally connected with the presbytery's action on the resignation of the Rev. James Carter as to be rightly considered a part of "such action as may be deemed advisable in the premises?"

The synod of Pennsylvania, when dismissing the appeal of John E. Dayton and others, answers this question definitely in the affirmative, as it says: "No parties have been aggrieved by the decision," and "the Presbytery acted within its constitutional rights." The general assembly, however, did not affirm this action of the synod, but sustained the appeal of John E. Dayton and others. It failed, however, to give any

definite judgment on the question of the constitutionality of the action of presbytery, nor did it definitely reverse that action; it merely remanded the case to the synod of Pennsylvania and directed the synod to send the case back to the presbytery of Northumberland for reconsideration and action, without pointing out wherein the error lay. This action of the general assembly in sustaining the appeal in this peculiar way was an inadequate and unsatisfactory ruling, as the failure to pronounce clearly upon the issue involved led only to additional complaints and appeals.

But the court below, in seeking to interpret and follow the decision of the general assembly, has declared the action of the presbytery at the pro re nata meeting illegal and invalid, and the defendants have accepted this finding of the court.

Two other questions remain for consideration:

1. Were the elections of elders at meetings held in the Church of the Covenant at the regular times, and moderated by the pastor, legal and valid?

2. Did the members of the old session cease to be active elders at the expiration of their terms of service, in April 1900, 1901 and 1902, or were they legally re-elected and installed?

The complainants admit that the usual elections were held by the congregation in April of each year after two regular announcements from the pulpit at the usual place of worship. These meetings were moderated by the pastor of the church, and at them defendants were elected as elders.

On March 27, 1900, the old session attempted by a resolution to postpone the annual election of elders from the 4th day of April following, until after the meeting of the general assembly or its final decision. The meeting at which they attempted to take this action was held at the residence of one of the elders in pursuance of a notice published in a daily newspaper, and the pastor of the church was not present, one of the elders acting as moderator pro tem.

The requirement of the form of government is express, that the pastor of the congregation shall always be the moderator of the session; except when for prudential reasons, it may appear advisable that some other minister should be invited to preside; in which case, the pastor with the concurrence of the session, is to invite such other minister to preside.

No good reason is shown why the pastor did not preside at this meeting. It was, therefore, irregular and its action was ineffective. If the pastor refuses to attend the meetings of the session or to name another minister to moderate them, the remedy is by complaint to the presbytery. Moreover, the regular annual election of elders was a matter for the congregation and was not a sessional matter at all. The government of the Presbyterian Church is republican in form, and the elders are simply the representatives of the people, to be chosen by them in the mode most approved, and in use in that congregation. As the trial court says in its opinion, "Every Presbyterian Church is a law unto itself in the election of elders and deacons, limited only to the qualification of the persons elected who must be male members in full communion."

There can be no question that under the rotary or limited term system, the terms of the members of the old session as active elders were definitely fixed, and that these terms expired at the annual elections held in April, 1900, 1901 and 1902.

The trial court was entirely correct in holding that the efforts of the old session to postpone the meeting of the congregation for the election of elders could not invalidate the regular annual elections held at the proper time and place, called and conducted according to the custom of that congregation. He was equally right in holding that the elections held by the plaintiffs and their adherents at the Y. M. C. A. rooms were irregular and not in accordance with the custom of the church. The announcements were not made from the pulpit of the church, but in the Y. M. C. A. building. They were made not by the pastor, but by certain ministers who officiated from time to time at the meetings held in the Y. M. C. A. rooms.

The evidence shows clearly that the real reason for holding services and meetings at the Y. M. C. A. rooms and elsewhere, was the unwillingness of the plaintiffs and their adherents to recognize and submit to the authority of the defendants as the true and legal session of the church.

We agree with the conclusion reached by the court below that the elders elected at the meetings held in the church, in April, 1900, 1901 and 1902, and regularly installed thereafter, constituted the real session of the church.

The assignments of error are overruled, this appeal is dismissed, and the decree of the court below, dismissing the bill, is affirmed.

Keck *v.* Philadelphia & Reading Railroad, Appellant.

Negligence—Railroads—Master and servant—Fellow servant—Act of April 4, 1868, P. L. 58.

Independently of the Act of April 4, 1868, P. L. 58, a railroad company was liable to the employees of another railroad company for negligence, just as to any other strangers, the general similarity and aims of the duties not being sufficient to bring them within the rule as to the risks of a common employment. The general effect of the act was to make three classes of persons, employees, quasi employees under the act and strangers.

Where the same track is used by two railroad companies, it must be considered for the application of the Act of April 4, 1868, P. L. 58, as the property of each while using it; and it is immaterial whether the use be by virtue of joint or several ownership, charter right, license or traffic agreement,

To bring a case within the second class distinguished in Spisak v. B. & O. R. R. Co., 152 Pa. 281, namely those where the employment is ordinarily the duty of railroad employees, the plaintiff must not only be engaged in such work but also be so engaged for or upon the property of the railroad by whose negligence he is injured.

In such cases the employees of each road accept the risk of their employment in regard to their own road but not those incident to the operation of the other road unless at the time engaged in some work for the other or for both roads jointly.

A locomotive engineer engaged in running a train of his own company over tracks of another company which his own company had permission to use, is not within the provision of the act of April 4, 1868, if he is killed by the negligence of employees of the other company.

Argued March 24, 1903. Appeal, No. 4, Jan. T., 1903, by defendant, from judgment of C. P. No. 3, Phila. Co., Dec. T., 1901, No. 2915, on verdict for plaintiff in case of Eliza A. Keck v. Philadelphia & Reading Railway Company. Before Mitchell, Fell, Brown, Mestrezat and Potter, JJ. Affirmed.

Trespass for death of plaintiff's husband. Before McMichael, J.

The material facts connected with the accident, out of which the action grew, were as follows: Plaintiff's husband was employed as a locomotive engineer by the Central Railroad Company of New Jersey.

By permission of the Philadelphia and Reading Railway Company the Central Railroad Company at the place where the accident occurred drew its trains over the tracks of the Reading Company, and in so doing used its own engine and crew. The railroad of the Reading Company at the place in question consisted of two tracks with turnouts and switches.

On one of the tracks at the time of the accident were two trains belonging to the Reading Company, both headed in the same direction, one moving and the other standing still. The Central Company train was moving on the adjoining track. Just as the moving Central train reached the end of the standing Reading train, the second train of the Reading Company came along the track occupied by its standing train and a tail end collision occurred, by which the caboose of the standing train was thrown upon the engine of the Central train and the engineer, plaintiff's husband, was killed.

Verdict and judgment for plaintiff for $12,500. Defendant appealed.

Error assigned was in refusing binding instructions for defendant.

Gavin W. Hart, for appellant.

A. T. Freedley, with him *U. S. Koons*, for appellee.

Opinion by Mr. Justice Mitchell, July 9, 1903:

When the same tracks are used by two railroad companies, how far does the operation of the Act of April 4, 1868, P. L. 58, in relief of each from liability to the employees of the other, depend on the ownership or title to the tracks? This question though more or less involved in some of the cases under the act has not been directly determined with reference to a general rule on the subject, unless in the recent case of Kelly v. Union Traction Co., 199 Pa. 322, which will be considered further on.

Independently of the statute each company was liable to the employees of the other for negligence just as to any other strangers, the general similarity and aim of the duties not being sufficient to bring them within the rule as to risks of a common employment: Catawissa R. R. Co. v. Armstrong, 49 Pa. 186. The general effect of the act was as has been said to make three classes of persons: employees, quasi employees under the act, and strangers.

It was held in Spisak v. B. & O. R. R. Co., 152 Pa. 281, that the cases under the act fall into two classes, first where the place of the accident "is clearly and for general purposes the 'roads, works, depots or premises' of the railroad company. In such cases it is sufficient if the person injured is lawfully 'engaged or employed on or about' them, and is not a passenger. . . . The other class is where the accident occurs in a place which is not exclusively and for general purposes, but only within a limited and statutory sense, the premises of the railroad company. In this class the nature of the employment at which the party injured was engaged at the time, becomes material. If it is business connected with the railroad in the sense that it is ordinarily the duty of railroad employees, then while the party is engaged at it, the statute treats him as a quasi employee and puts his rights on the same basis. If however the work has no relation to railroad work as such, and is connected with the railroad only by irrelevant and immaterial circumstances of locality, the case is not within the statute at all."

This distinction has been constantly adhered to since, and under it when an accident occurs upon a track used by different roads, the question at once arises, whose track is it to be considered for the purposes of the act of 1868?

The cases establish that the nature and extent of the ownership of the tracks is not a controlling factor. The case which comes nearest to a direct decision on the point involved in the present controversy is Kelly v. Union Traction Co., 199 Pa. 322, already mentioned. Two passenger railway companies ran their cars east and west on the same tracks on Arch street in the city of Philadelphia, and by arrangement between themselves used the south track going east and the north track going west, connecting them by two switches at the eastern terminus.

The duty of the car first arriving at the terminus was to run east of the east switch while the car following it stopped between the two switches; the motorman of the first or eastern car was then to reverse his trolley, turn the east switch and cross over to the north track for his western trip. On the occasion of the accident he neglected to turn the switch and ran his car west on the east-bound track till it struck the car that had followed it east, and injured the plaintiff who was the conductor, in the employ of the other company. It was held that the case was not within the act of 1868 and the plaintiff could recover. It is settled, said the court, "that the road on or about which the accident occurs need not be owned by the defendant company to bring it within the terms of the act of 1868, but the use, by agreement, of the road of another company by the defendant company makes it the latter's road in contemplation of the act. . . . The track at the point of the accident was in the use of the Hestonville Company and therefore had, by agreement of the parties, become for the time being the road of that company. Its employees in the operation of its cars had a right to be there and they could enforce their right to protection against the negligence of everyone save the co-employees of that company." It does not appear in the report but was a fact in the case that both companies had a charter right to use Arch street, and the use of the same tracks while by agreement between them was not really a lease or license from the first which laid the tracks, but an adjustment of equal rights so as to avoid a conflict. This fact, it is very forcibly argued by the appellants, distinguishes the case from the present, and puts the plaintiff in the class of permissive users of the railroad's premises such as in Ricard v. North Penna. R. R. Co., 89 Pa. 193; B. & O. R. R. Co. v. Colvin, 118 Pa. 230; Miller v. Cornwall R. R. Co., 154 Pa. 473, and similar cases.

The decisions however show that this difference has not been considered material. In Mulherrin v. Delaware, etc., R. R. Co., 81 Pa. 366, the plaintiff was an employee of the company owning the tracks, and the action was against the licensee. It was held that the latter's title was not material and the case was within the act. The plaintiff, said PAXSON, J., "was not an employee of the defendants but he was employed on or about their road. The fact that the defendants were only en-

titled to track rights to the road is not material. This is not a question of the extent of their title. It was the road of the defendant for the purpose of moving their trains which is sufficient to bring the case within the act of 1868." So in Weaver v. Phila., etc., Ry. Co., 202 Pa. 620, the siding was on the land of plaintiff's employer, and the cars, etc., were the property of the defendant, though used on the land. "What matters it," said Mr. Justice DEAN, "whether this was by reason of an ownership of the land, a formal written license, or by a parol permission of the iron company; for all the purposes of a common carrier, the premises were the premises of the railroad company in shipping in and out the iron company's freight."

The rules to be deduced from the cases as substantially determined in Kelly v. Traction Co. are:

First, where the same track is used by two railroad companies, it must be considered for the application of the act of 1868 as the property of each while using it.

Secondly, whether the use be by virtue of joint or several ownership, charter right, lease, license or traffic agreement, is immaterial.

Thirdly, to bring the case within the second class distinguished in Spisak v. B. & O. R. R. Co., 152 Pa. 281, namely those where the employment is ordinarily the duty of railroad employees, the plaintiff must not only be engaged in such work but also be so engaged for or upon the property of the railroad by whose negligence he is injured. Thus in the present case the plaintiff's husband was engaged in railroad work as a locomotive engineer, but not for the defendant, nor upon premises which were to be treated as defendant's at that time. He was therefore not within the act.

Fourthly, in such cases the employees of each road accept the risks of their employment in regard to their own road but not those incident to the operation of the other road, unless at the time engaged in some work for the other or for both roads jointly.

The distinctions thus made were not directly developed by the facts in the earlier cases, but as already shown the language of the opinions indicates the trend of thought on the subject, and no case has been decided which upon its facts is out of

harmony with the rules now laid down. Even Mulherrin v. Del. & R. R. Co., 81 Pa. 366, where the facts are not very clearly stated with reference to this point, which was not raised, when carefully examined shows that it is in accord. Plaintiff got off his train to open a switch in the performance of his duty, and his train passed on. He waited until it returned on another track and then walked down the first track on his way to rejoin his train, and while so walking was struck by the train of the other company. The track on which he walked was the property of his road and if he had been injured by the other train while in the performance of his duty on it he would have had his action. But at the time of the accident his train had passed off that track which had become temporarily the property of the other company, the defendant, by the entry of its train. Plaintiff therefore was walking on defendant's track, and was rightfully held guilty of contributory negligence, as well as having his case come within the act of 1868.

Judgment affirmed.

McCaul's Estate.

Contract—Course of business—Architect—Contractor.

An architect cannot recover from the estate of a deceased builder for services in preparing plans for a store building, where the evidence shows that the builder never constructed the building, and that the uniform course of business between the deceased and the architect was for the latter to prepare drawings and plans for buildings, but to receive no pay therefor unless the deceased did the work under them.

Argued March 24, 1903. Appeal, No. 329, Jan. T., 1902, by Robert C. Clarkson, from decree of O. C. Phila. Co., Jan. T., 1902, No. 495, sustaining exceptions to adjudication in estate of Charles McCaul, deceased. Before MITCHELL, FELL, BROWN, MESTREZAT and POTTER, JJ. Affirmed.

Exceptions to adjudication.

The facts are stated in the opinion of the Supreme Court.

Error assigned was in sustaining exceptions to adjudication.

Francis Shunk Brown, of *Simpson & Brown*, with him *Ira J. Williams*, for appellant.

John G. Johnson, for appellee.

Opinion by Mr. Justice Fell, July 9, 1903:

This appeal is from an order of the orphans' court disallowing a claim for $20,000 for services in preparing plans for a store building. The question presented at the audit was purely one of fact. The appellant's claim was on a quantum meruit, and rested on proof of the services performed and of their value based on the architect's schedule of prices.

Omitting unnecessary details, the facts established in defense were as follows: Charles McCaul, the decedent, was a builder of exceptional skill and experience. A few months before his death he entered into a contract with John Wanamaker to furnish the plans for and superintend in all its details the construction of a building which was to cover an entire block and cost several million dollars. He was to be paid for his services a percentage of the total cost of the building. His first duty under the agreement was to furnish plans for Mr. Wanamaker's approval. Until this was done he would earn nothing under the agreement, and unless he succeeded in furnishing plans with which Mr. Wanamaker was satisfied, the whole agreement would fall. Mr. McCaul died before plans for the whole building were prepared, and before plans for any part of it were approved, and the contract was unperformed and impossible of performance. The appellant, at the instance of Mr. McCaul, and with the approval of Mr. Wanamaker, undertook the preparation of plans for the mechanical plant of the building. One of his assistants, to whom he paid $100 a month, was put at this work. Preliminary drawings were prepared and submitted to Mr. Wanamaker, but they were not approved by him because they involved an expenditure for the mechanical plant which in his judgment was out of proportion to the contemplated cost of the whole building. The appellant was Mr. McCaul's mechanical engineer, not under a continued employment, but employed whenever his services

were required. He had prepared drawings and plans for a number of large buildings at the request of Mr. McCaul, and between them there was an understanding, clearly shown by indubitable evidence, that he was not to charge for plans furnished by him unless Mr. McCaul did the work under them. The drawings furnished in this case were only tentative. The assistant who prepared them testified that they were to be submitted to Mr. Wanamaker to see if he would like them, and if he did not like them they would be thrown away and a new set made. Presumably the agreement that had existed for years without interruption continued, and these drawings were made under it. It is inconceivable that it should have been otherwise, and that Mr. McCaul under any other agreement incurred a liability for $20,000 for drawings that might never be of the slightest value to him. There is not a word of testimony that shook this presumption. The whole evidence tended to show the continuance of the relation under the same terms as to payment.

The decree is affirmed.

Krimm *v.* Devlin, Appellant.

Mortgage—Defense—Contract.

In an action upon a mortgage it appeared that prior to the date of the mortgage, the mortgagee had contracted to furnish mill work to the mortgagor. The plaintiff, a manufacturing company, agreed with the mortgagee to manufacture and deliver to him the mill work. The mortgagor defaulted in the payments to the mortgagee, and the latter to the plaintiff. The three parties came together and entered into an agreement in writing by which the mortgagor agreed to give the mortgage in suit to the mortgagee, and the latter agreed to assign it forthwith to plaintiff. The mortgagor also agreed to give security for the balance of mill work to be furnished under the original contract between the mortgagee and himself. The plaintiff agreed to discontinue a suit which it had begun against the mortgagee. *Held*, that under the agreement the plaintiff was under no contractual obligation to supply the balance of mill work to the mortgagor, and that a failure to do so was no defense to the mortgage.

Argued March 25, 1903. Appeal, No. 31, Jan. T., 1903, by

defendant, from order of C. P. No. 5, Phila. Co., Sept. T., 1902, No. 3319, making absolute a rule for judgment for want of a sufficient affidavit of defense in case of Charles R. Krimm, Assignee of John Parker, v. John Devlin, Mortgagor. Before MITCHELL, FELL, BROWN, MESTREZAT and POTTER, JJ. Affirmed.

Scire facias sur mortgage.

Rule for judgment for want of a sufficient affidavit of defense.

From the record it appeared that defendant claimed as a defense to the suit the failure of the Williamsport Planing Mill Company, the real owner of the mortgage, Charles R. Krimm being its treasurer, to deliver within sixty days certain mill work under an agreement in writing, which was as follows:

"This agreement made this nineteenth day of March, A. D. 1901, between Williamsport Planing Mill Company, Limited (hereinafter called Planing Company), of the one part; John Parker of the second part and John Devlin of the third part.

"Whereas, the said Planing Company having agreed to furnish lumber and mill work to said Parker to be by him furnished to the said John Devlin, under an agreement made between Parker and Devlin for furnishing such lumber and mill work to operation of said Devlin, west side of Forty-eighth street; east side of Fiftieth street; east and west side of St. Barnard and Fallon streets, in the city of Philadelphia.

"And whereas there is a balance of eight thousand five hundred dollars due by Devlin to Parker, and by him due to the Planing Company for lumber and mill work heretofore furnished, and it is desired to pay for the same in part and secure payment of the balance thereof; and it is also further desired by the said parties, to provide for the payment for the balance of the lumber and mill work yet to be delivered under the contract between Parker and Devlin as above mentioned.

"Now therefore this agreement witnesseth: That in consideration of the premises and of mutual covenants, the said parties have agreed to and with each other as follows:

"First. As payment on account of the above balance of eight thousand five hundred dollars now due, said John Devlin will make, execute and deliver to said Parker his bond and mortgage

for five thousand (5,000) dollars bearing even date herewith, payable within one year from date with six per cent (6%) interest, to be secured upon premises Nos. 1432 and 1436 Wolf street, Philadelphia, each subject to a ground rent of twenty-five hundred dollars ($2,500) issuing thereout, and forty-eight (48) lots of ground situate on Packer, Mole and Curtin streets, in the city of Philadelphia.

"It is further agreed that said Parker shall forthwith assign said bond and mortgage for five thousand dollars ($5,000) unto said Planing Company, in payment of five thousand dollars ($5,000) of the above mentioned balance due to said company for lumber and mill work as aforesaid.

"Second. Said John Devlin will also, on the day of the date hereof, simultaneously herewith, execute and deliver unto the said John Parker a second bond and mortgage for thirty-five hundred dollars, secured upon the above described houses and lots of ground, and said Parker will forthwith assign said second mortgage unto said Planing Company; said bond and mortgage shall also be payable within one year, with interest at 6%, and shall be held by said Planing Company as collateral security for the payment of the above mentioned sum of thirty-five hundred ($3,500) dollars. Accompanying the said second mortgage, said John Devlin shall give one or more promissory notes, aggregating the amount thereof, to said Parker, who shall endorse the same to the said Planing Company; said notes shall be drawn at four months and renewed twice upon payment of discount, any amount paid on account thereof to be deducted before renewal. All sash blinds, shutters, bay windows, bay window casings and show sills to be delivered within fifteen days after the consummation of this agreement, and the balance as ordered, so that the whole thereof shall be delivered within sixty days after such consummation.

"Third. The said John Devlin, for the balance of lumber and mill work to be furnished and delivered under the contract made between Parker and himself as aforesaid, will make provision with one of the trust companies in the city of Philadelphia for the payment of such lumber and mill work, in cash, as the same is delivered.

"Fourth. Upon the day of the date hereof the said Parker will give his bond and mortgage for six thousand dollars ($6,000),

payable within one year, with interest at five per cent (5%) per annum, secured upon planing mill and lot of ground thereunto belonging, situate at the southeast corner of Sixteenth and Fitzwater streets in the city of Philadelphia, subject to a ground rent issuing thereout, the principal whereof is about six thousand dollars ($6,000) to be held by the said Planing Mill Company as security for the payment of the balance of thirty-five hundred dollars due them for lumber and mill work furnished to the day of the date hereof, upon payment of which balance the said bond and mortgage as well as the above mentioned second mortgage given by the said Devlin, shall be forthwith satisfied of record by the said Planing Mill Company. It is further agreed that the above mentioned bonds and mortgages shall be prepared and accompanied by title insurance policies at the expense of the said John Devlin, and the said $6,000 mortgage shall be accompanied by fire insurance in the sum of $4,000.

"It is further agreed, that the suit now instituted by the planing company against the said Parker, in common pleas court No. 5, of Philadelphia county, as of March term, 1901, No. 173, shall be forthwith discontinued of record upon the delivery of the bonds and mortgages provided for in the above agreement; the costs of suit to be paid by the said John Devlin."

The court made absolute a rule for judgment for want of a sufficient affidavit of defense.

Error assigned was the order of the court.

F. S. Cantrell, Jr., with him *F. S. Cantrell*, for appellant.

Alex. Simpson, Jr., with him *Carroll R. Williams*, for appellee.

Opinion by Mr. Justice Fell, July 9, 1902:

This appeal is from an order of the court making absolute a rule for judgment for want of a sufficient affidavit of defense in an action on a mortgage. The defense set up is based on a written agreement made at the time the mortgage was assigned to the plaintiff, who holds it as treasurer of the Williamsport Planing Mill Company. It is conceded that unless by the terms of this agreement the mill company was bound to de-

liver building materials directly to the defendant, there is no valid defense to the action.

The circumstances under which the agreement was made, as shown by its recitals and the averments of the affidavit, were these: The mill company had contracted with John Parker to furnish him with a large amount of lumber and mill work, and he had contracted with the defendant to furnish the lumber and mill work for eighty houses that the defendant was building. When a part had been furnished to the defendant, he defaulted in his payments to Parker, and Parker defaulted in his to the mill company. The latter refused to furnish more material to Parker unless paid for that which had been furnished, and secured for the balance. The defendant owed Parker $8,500, and Parker owed this amount to the company. Suit had been brought against Parker, and liens filed against the houses, and the operation was at a standstill.

The parties then came together and agreed with each other as follows: First, that the defendant should execute a mortgage to Parker for $5,000 in part payment of the balance due him, and that Parker should assign this mortgage to the company on account of his indebtedness to it. This is the mortgage in suit, and it was accepted by the company in payment as far as it went. Second, that the defendant should execute to Parker a second mortgage for $3,500, which he was to assign to the company as collateral security for the balance due. Promissory notes were to be given with the mortgage by the defendant to Parker and to be indorsed by him to the company. Third, that as additional collateral for the payment of the balance of $3,500, Parker was to give his own mortgage for $6,000 to the company. It was further agreed that the defendant should arrange with a trust company to secure the payment in cash for materials delivered thereafter under the contract between himself and Parker; that the company should discontinue the proceedings it had commenced against Parker for the collection of the amount due by him, the costs of the suit to be paid by the defendant. The dispute arises over a part of the agreement found in the article by which provision is made to secure the balance of the debt then due by Parker to the company, which is as follows: "All sash, blinds, shutters, bay windows, bay window

cases and show stills to be delivered within fifteen days after the consummation of this agreement, and the balance as ordered, so that the whole thereof shall be delivered within sixty days after such consummation.

Unless this part of the agreement gave rise to a direct obligation on the part of the company to the defendant, he has no standing to defend this action because of loss resulting from delay in delivery. The agreement made no change in the relation in which the parties had stood to each other. The defendant was in default in not having paid Parker. He was unable to pay, liens had been placed on his houses, and work was stopped. Unless the company could be induced to carry out its contract with Parker notwithstanding its breach, the disaster would be complete. The company made a concession by accepting a mortgage in part payment, and security from Parker for the balance due by him and to become due; and it agreed to resume the delivery of materials. The prior agreement between the company and Parker was not abrogated. Deliveries were not to be made by the company to the defendant, and he assumed no liability to it. It could not have maintained an action against him for the price of materials furnished, and it became in no way liable to him. The parties stood precisely as they had stood before with two independent contracts. The only change affected by the agreement was as to the manner and time of payment. We find nothing in it nor in the averments contained in the affidavits that sustains the contention that there was a contractual relation between the company and the defendant as to future deliveries.

The judgment is affirmed.

Weiss *v.* Marks, Appellant.

Payment—Accord and satisfaction—Payment before debt is due.

The rule that payment of a smaller sum is not a consideration to support an accord and satisfaction in regard to a larger sum due, has always been regarded as more logical than just or businesslike, and even small circumstances of variation have always been held sufficient to prevent its application. Hence a payment in advance, no matter how short a time, has been uniformly held to constitute a good consideration.

Argued March 25, 1903. Appeal, No. 330, Jan. T., 1902, by defendants, from order of C. P. No. 3, Phila. Co., June T., 1902, No. 3893, making absolute rule for judgment for want of a sufficient affidavit of defense in case of Joseph W. Weiss and Nachman Segal, Co-partners, trading as Weiss & Segal, v. William Marks, Ferdinand Marks and Emanuel Marks, trading as Marks Bros. Before MITCHELL, FELL, BROWN, MESTREZAT and POTTER, JJ. Reversed.

Rule for judgment for want of a sufficient affidavit of defense.

The material portion of the affidavit of defense was as follows:

"That the plaintiffs, by and through their said duly authorized agent, Charles J. Schulze, on August 8, 1902, verbally agreed with the defendants, by and through their, the defendants' duly authorized agent, Lawrence H. Marks, that in consideration of the payment of $2,000 in cash on account of the claim of plaintiffs, and the further consideration of the maturing of a part of the plaintiffs' claim for merchandise sold and delivered by the plaintiffs to the defendants, towit: the invoices dated June 1, June 4, and July 10, 1902, they, the plaintiffs, would accept of and from the defendants the entire balance claimed by them, amounting to the sum of $3,992.62, in three installments of $1,330.89 each, in one, two and three weeks thereafter, the first payment to be made on August 16, 1902. That relying on this agreement the defendants paid the plaintiffs on the said August 8, 1902, the sum of $2,000 in cash, and agreed to pay the plaintiffs the remaining balance in three equal installments in one, two and three weeks thereafter, the first payment to be made on August 16, 1902. That the plaintiffs in violation of this agreement caused to be issued the writ in the above case on August 15, 1902, as appears of record, and filed a statement, claiming the sum of $3,204.69 of the $3,992.62 claimed by the plaintiffs against the defendants, and being part of the moneys claimed by the plaintiffs for the merchandise herein referred to as having been sold by the plaintiffs to the defendants."

The court made absolute rule for judgment for want of a sufficient affidavit of defense. Defendant appealed.

Error assigned was in making absolute rule for judgment for want of a sufficient affidavit of defense.

William A. Carr, with him *W. Horace Hepburn* and *Sidney L. Krauss*, for appellants.—An agreement to pay a debt before it is due furnishes a good and valid consideration for an agreement upon the part of the creditor. Such an agreement is or may be beneficial to a creditor, or detrimental to the debtor, and this is sufficient to make it a good consideration for the promise: 1 Chitty on Contracts (11th ed.), p. 62; 1 Parsons on Contracts (8th ed.), p. 453; Hearn v. Kiehl, 38 Pa. 147; Rising v. Patterson, 5 Wharton, 316; Brooks v. White, 43 Mass. 283; Rose v. Hall, 26 Conn. 392.

Benjamin Alexander, for appellees, cited: Rumberger v. Golden, 99 Pa. 34; Partridge v. Partridge, 38 Pa. 78; Olmstead v. Latimer, 158 N. Y. 313 (53 N. E. Repr. 5); Parmelee v. Thompson, 45 N. Y. 58; Moore v. Fire Ins. Co., 196 Pa. 30; Blanton v. Craven, 173 Pa. 374.

Per Curiam, July 9, 1903:

The supplemental affidavit of defense set up that defendant being indebted to plaintiffs on several purchases of goods, the agreed term of credit on some of which had not expired, on August 8, 1902, made a settlement with the plaintiffs by which the latter agreed to accept $2,000 in cash on general account, and the balance in three equal installments in one, two and three weeks thereafter; that the cash payment was made; and that thereby the time of payment of some of the bills for purchases was advanced to an earlier date than at that at which they would otherwise have matured; but that plaintiffs in violation of the agreement issued the writ in this case before the first of the installments fell due.

This was a good defense in abatement of the present suit. The rule that payment of a smaller sum is not a consideration to support an accord and satisfaction in regard to a larger sum due, has always been regarded as more logical than just or businesslike, and even small circumstances of variation have always been held sufficient to prevent its application. Hence a payment in advance, no matter how short a time, has been uni-

formly held to constitute a good consideration. See on this subject the remarks in Ebert v. Johns, 206 Pa. 395; and Hartman v. Danner, 74 Pa. 36.

Judgment reversed and procedendo awarded.

Helffrich *v.* Greenberg, Appellant.

Practice, C. P. —Affidavit of defense—Affidavit by executor—Rules of court.

The court of common pleas has the power to make a rule of court as follows : " An affidavit of defense shall be required from executors, administrators, guardians, committees and others sued in a representative capacity. Provided, that an affidavit by the defendant in such a case, stating that he has made diligent inquiry and has not been able to obtain sufficient information to enable him to set forth particularly the nature and character of the defense but that he believes that there is a just and legal defense, shall be deemed sufficient compliance with this rule."

Argued March 26, 1903. Appeal, No. 70, Jan. T., 1903, by defendant, from judgment of C. P. No. 4, Phila. Co., Dec. T., 1902, No. 3224, on case stated in suit of Henry B. Helffrich to use of Philadelphia Trust Safe Deposit & Insurance Company, Executors of L. Taylor Dickson, Deceased, v. Mendel Greenberg. Before MITCHELL, FELL, BROWN, MESTREZAT and POTTER, JJ. Affirmed.

Case stated to determine the validity of title to real estate.

From the case stated it appeared that plaintiff's title was derived through a sheriff's sale in a case in which judgment was entered against an administrator for want of a sufficient affidavit of defense. The judgment was attacked as invalid on the ground that the court of common pleas had no power to make a rule of court requiring administrators and executors to file affidavit of defense. The court upheld the validity of the rule and entered judgment for plaintiff upon the case stated for $4,500. Defendant appealed.

Error assigned was the judgment of the court.

Henry A. Hoefler, for appellant, cited: Leibert v. Hocker, 1 Miles, 263; Seymour v. Hubert, 83 Pa. 346; Mut. Life Ins. Co. v. Tenan, 188 Pa. 239; Tenan v. Cain, 188 Pa. 242.

C. Berkeley Taylor, for appellee, cited: Detmold & Cox v. Gate Vein Coal Co., 3 W. N. C. 567; Vanatta v. Anderson, 3 Binney, 417: Smith v. Times Pub. Co., 178 Pa. 481; Stedman v. Poterie, 139 Pa. 100.

Opinion by Mr. Justice Fell, July 9, 1903:

This was a case stated to determine the validity of the title to real estate acquired by a sheriff's sale under a judgment entered against an administrator for want of an affidavit of defense. The only subject to be considered is the power of the courts of common pleas of Philadelphia to make the following rule adopted by them in March, 1893: "An affidavit of defense shall be required from executors, administrators, guardians, committees and others sued in a representative capacity. Provided: That an affidavit by the defendant in such case, stating that he has made diligent inquiry and has not been able to obtain sufficient information to enable him to set forth particularly the nature and character of the defense but that he believes there is a just and legal defense, shall be deemed sufficient compliance with this rule."

The practice of taking judgment by default for want of an affidavit of defense has its origin in an agreement entered into by members of the Philadelphia bar in 1795. The practice was subsequently authorized by rule in the Supreme Court, the common pleas courts, and the district court of Philadelphia. It first received legislative sanction by the act of March 28, 1835, relating to the district court of Philadelphia, and by special acts it was extended to nearly all the courts in the state: Sellers v. Burk, 47 Pa. 344; note to Detmold and Cox v. Gate Vein Coal Co., 3 W. N. C. 567. The first general act upon the subject was the procedure act of May 25, 1887. This sanction however, was not necessary to give validity to the practice. It was decided as early as 1811 in Vanatta v. Anderson, 3 Binn. 417, that a court of common pleas, under its general power to regulate its practice, had authority to make a rule requiring defendants to file an affidavit of defense and to

direct judgment to be entered in case of default. This decision has never been called in doubt, and it has been cited with approval in a large number of cases.

For the protection of decedents' estates a construction was placed on the act of 1835 that relieved executors and administrators from filing affidavits of defense in actions on contracts made by a decedent. Although there is no express provision exempting them from its operation, they were deemed not to be within the spirit of the act: Leibert v. Hocker, 1 Miles, 263; Seymour v. Hubert, 83 Pa. 346. The same ruling was made in Mutual Life Insurance Co. v. Tenan, 188 Pa. 239, after the passage of the act of 1887. No reference is made in this decision to the later act, but the construction given to the earlier act would evidently apply to it. The question in these cases however was one of construction only. In none of them was there a rule of court requiring an affidavit, and the decisions do not touch the power of the court to require by rule the filing of an affidavit of defense by one sued in a representative capacity. The general power of courts to establish reasonable rules for the regulation of their practice is undoubted.

The judgment is affirmed.

Devlin, Appellant, *v.* Philadelphia.

Road law—Change of grade—Damages—Paving street.

It is the physical change and not the mere establishment of a grade on the official plans which gives a right of action, and no damages are recoverable for the establishment of the grade until the actual work of grading is begun.

A person who owns land on both sides of a street on a city plan with a grade established above the natural surface, cannot, after he has built houses according to the established grade, and, with the permission of the city authorities, paved the street according to the established grade, recover damages for injuries to his land caused by the elevation of the natural surface of the street to the established grade.

Argued Jan. 21, 1903. Appeal, No. 260, Jan. T., 1902, by plaintiff, from judgment of C. P. No. 3, Phila. Co., Sept. T., 1899, No. 824, refusing to take off nonsuit in case of John

Devlin v. Philadelphia. Before MITCHELL, DEAN, FELL, BROWN, MESTREZAT and POTTER, JJ. Affirmed.

Appeal from award of viewers. Before MCCARTHY, J.

The facts are stated in the opinion of the Supreme Court.

The court entered a compulsory nonsuit which it subsequently refused to take off.

Error assigned was refusal to take off nonsuit.

John C. Bell, for appellant.—As the city in the case at bar, pursuant to ordinance, did in fact make a contract with the plaintiff to pave Gerritt street to the established grade and do all filling and leveling necessary to complete such pavement at such established grade, which contract was duly performed, the plaintiff is clearly entitled to recover just compensation for the injury to his lots resulting from such filling and paving at said established grade: Dickson v. Meadville, 23 P. L. J. 127; New Brighton Borough v. United Presbyterian Church, 96 Pa. 331; Hendrick's Appeal, 103 Pa. 358; Ogden v. Phila., 143 Pa. 430; O'Brien v. Phila., 150 Pa. 589; Groff v. Phila., 150 Pa. 594.

J. Lee Patton, assistant city solicitor, with him *John L. Kinsey*, city solicitor, for appellee.—The plaintiff in this case is not entitled to recover. The city of Philadelphia made no physical change in the bed of Gerritt street, nor did councils authorize any physical change to be made in the bed of the street. For the mere plotting of a street, or mere establishment of a paper change of grade no action arises: In re Plan 166, 143 Pa. 414; Ogden v. Phila., 143 Pa. 430.

The plaintiff in this case obtained a mere license from the city to enter upon the highway and pave and grade the same for his own benefit. This he could not have done without the permission of the city. In his agreement with the city, plaintiff expressly stipulated, in accordance with the terms of the ordinance, that the work was to be done without cost to the city, and further expressly assumed all liability for damage to persons or to property. Plaintiff therefore is certainly not entitled to recover: Axford v. Philadelphia, 46 Legal Int. 6; Groff v. Philadelphia, 150 Pa. 594.

Opinion by Mr. Justice Fell, July 9, 1903:

The plaintiff purchased land abutting on both sides of a private street. Soon after his purchase the street was placed on the city plan, and its grade was established at about two feet above the natural surface. Desiring to build houses on this land, he applied to the district surveyor to have the house lines and grade lines marked on the ground, and he erected his buildings in accordance with these lines. When the buildings were completed he applied to the department of public works for permission to pave the street, and permission was granted in pursuance of authority given the department by ordinance of councils, upon condition that the plaintiff should do all the work necessary to complete the pavement to the finished grade and furnish all materials therefor, maintain the pavement for three years from the date of its completion, and be responsible for all losses to person or property that might result from the prosecution of the work during its progress. After the completion of the work, he brought this action against the city to recover damages for injuries to his land caused by the elevation of the natural surface of the street to the established grade.

The rule established by our cases is that it is the physical change, and not the mere establishment of a grade on the official plans, that gives a right of action, and no damages are recoverable for the establishment of the grade until the actual work of grading is begun: In re Plan 166, 143 Pa. 414; Ogden v. Philadelphia, 143 Pa. 430; Clark v. Philadelphia, 171 Pa. 30; Howley v. Pittsburg, 204 Pa. 428. This is conceded by the appellant, but he claims a right of action on two grounds: (1) that he was obliged by the city to build at the established grade, and that his land was injured by reason thereof; (2) that the city in fact contracted with him to pave the street to the established grade, and that the elevation of the natural surface of the street was its act.

Neither position is tenable. The appellant in building was required to keep within his own lines, and not to encroach upon the street. He was not obliged to conform to the established grade, but was at liberty to build on the ground as he pleased. If he built without regard to the grade lines, he could not recover for injury to his lots when the grading

should be done, but he was under no compulsion. The case is clearly distinguishable from Philadelphia v. Linnard, 97 Pa. 242, and In re Widening of Chestnut Street, 118 Pa. 593, in which the owners of properties on Chestnut street were obliged in rebuilding to recede from the former building line to a new one that had been established. There was no contract that imposed a liability on the city. The ordinance under which the appellant asked and obtained permission to enter upon and pave the street authorizes the director of public works, in his discretion, to permit owners to pave and repave streets in front of their properties. It fixes the materials to be used, and directs that the paving shall be done in the usual manner under the direction of the department and without cost to the city. The object of the ordinance is to enable property owners who have built in advance of street improvements to pave streets, and others to repave with new and more expensive materials for their own advantage. The ordinance does not refer to the subject of grading, and it was not intended to provide for it except as it became necessary incidentally in order to make a proper pavement. The contract was not to do work for the city. It was intended merely to secure the city in the event of the failure of the appellant to do what he agreed to do if permitted. The requirement that he should pave to the established grade if he paved at all was one of the conditions of the grant of permission. This was what he wanted to do. He had built his houses at that grade, and a pavement on the natural surface would have been of little value to them. The city did not cause the grading to be done, but merely granted the appellant a license to do it for his advantage. If, in securing the advantage, he sustained an incidental loss, it is the result of his own act, and a part of the cost of the privilege he sought and used.

The judgment is affirmed.

Commonwealth to use, Appellant, *v.* Patterson.

Municipalities—Philadelphia—Public officers—Accounts—Audit—Act of June 1, 1885.

Under the act of June 1, 1885, relating to the government of the city of Philadelphia, it is the duty of the controller of the city to audit the accounts of the health officer, and in the absence of gross fraud practiced upon the controller, or collusion between him and the accounting officer, his official audit is conclusive upon the city, and this is the case although the audit may not have been actually filed in the court of common pleas as provided by the act.

The fact that a public officer has not objected to a reaudit of his accounts for certain years by the controller, will in no way estop him from objecting to another audit of the same years by a new controller.

Argued Jan. 28, 1903. Appeal, No. 204, Jan. T., 1902, by plaintiff, from judgment of C. P. No. 4, Phila. Co., March T., 1887, No. 202, on verdict for defendant non obstante veredicto in case of Commonwealth to use of City of Philadelphia v. Joseph C. Patterson, Jr., Administrator of Joseph G. Patterson, Deceased, et al. Before MITCHELL, DEAN, BROWN, MESTREZAT and POTTER, JJ. Affirmed.

Assumpsit on an official bond. Before AUDENRIED, J.

At the trial the court directed a verdict for $19,132.39, reserving the following questions of law:

1. Were the commonwealth and the city of Philadelphia concluded for the purposes of this claim by the action of the controller of his subordinates prior to an investigation upon which was based the affidavit of the city controller offered in evidence?

2. Was the affidavit of the city controller, which was offered, proper evidence of the amount of default?

3. Was there any legal proof of any default presented in the case upon which a verdict in favor of the plaintiff can be sustained?

The court subsequently entered judgment for defendant non obstante veredicto.

Error assigned was the judgment of the court.

James Alcorn, assistant city solicitor, with him *Richard*

Salinger and *John L. Kinsey*, city solicitor, for appellant, cited: Richter v. Penn Township, 9 Pa. 79; Blackmore v. Allegheny, 51 Pa. 160; Baily v. Com. 20 W. N. C. 221; Com. v. Comly, 3 Pa. 372; Nason v. Poor Directors, 126 Pa. 445; United States v. Prescott, 44 U. S. 578.

Robert Alexander, of *Alexander & Magill*, with him *Charles F. Ziegler*, for appellees, cited: Blackmore v. Allegheny, 51 Pa. 160; Com. v. Scanlan, 202 Pa. 250; Westmoreland County v. Fisher, 172 Pa. 317.

Opinion by Mr. Justice Dean, July 9, 1903:

Joseph G. Patterson, the defendant, was appointed health officer of Philadelphia, February 24, 1887. He gave bond with two sureties in the sum of $15,000, conditioned for the faithful performance of his duties. He went into office March 11, 1887, and served until December 12, 1891, when he resigned. Judgment was entered on his bond as required by act of assembly the day his official duties commenced. It was his duty to collect all moneys, penalties and claims arising out of matters under the supervision of the city board of health, and pay them over to the city treasurer, who fixed the dates and amounts of city money thus received by the health officer?

It is interesting to notice the growth of the city government and the progress in legislation with reference thereto up to the act of June 1, 1885, known as the "Bullitt bill," but that legislation does not materially aid in determining the issue before us, and, therefore, it is not necessary to go into a history of it. The board of health is attached to, and is part of, the department of public safety. The Bullitt bill went into effect the first Monday of April, 1887; Patterson went into office March 11 of that year. The act referred to says: "The controller shall at the end of each fiscal year, or oftener if required by councils, and also, upon the death, resignation, removal or expiration of the term of any officer, audit, examine and settle the accounts of such officer and if he shall be found indebted to the city, the controller shall state an account and file the same in the court of common pleas."

The accounts of Patterson as health officer were audited by Controller Dechert for the year 1887, and found to be correct.

His accounts for 1888 were audited by the same officer and found to be correct. In September, 1890, the same officer re-audited the accounts of 1887, 1888 and 1889, and found a balance against Patterson of $4,792.20. This amount he at once paid into the city treasury and dismissed clerk Young, through whose conduct, it was alleged, the shortage occurred. In October, 1890, Controller Dechert again audited the accounts of 1887, 1888 and 1889, and made an audit of the account of 1890 for part of the year. He found there was a balance in Patterson's hands of $7,838.45, which was at once paid into the city treasury. The controller then gave Patterson this certificate:

"October 8, 1890.

"JOSEPH G. PATTERSON, ESQ.,
"Health Officer, Philadelphia.

"This is to certify that the accounts of your bureau have been audited and adjusted by this department up to and including a part of September 11, 1890, and a deficiency of $7,838.95 has been found, which amount has this day been paid into the city treasury.

"ROBERT P. DECHERT,
"City Controller."

None of these audits by Controller Dechert were filed in the court as directed by the act.

Mr. Dechert's term having expired, on January 1, 1891, Thomas M. Thompson, a new controller, came into office. December 12, 1891, about a year after he had been in office, Controller Thompson again went over the accounts of 1887, 1888, 1889 and 1890 and found a balance against Patterson for those years of $12,044.56, nearly all for the years 1887 and 1888. Mr. Pugh, an assistant, testifies that this was a "complete new audit" of the accounts of 1887, 1888, 1889 and 1890.

On July 8, 1890, scire facie was issued on the original judgment against Patterson and his sureties to recover the balance found against him by Controller Thompson; to this an affidavit of defense was filed; afterwards the court on rule opened the judgment and the case proceeded to trial, apparently, on an issue to determine, what if any amount defendants were indebted on the judgment bond. The court directed a verdict for the full amount of the city's claim, $19,133.29, subject to its

opinion on three reserved points. Afterwards the court entered judgment for defendants, notwithstanding the verdict in a very full opinion. While the judgment is correct, the court more than intimates a doubt of the conclusiveness of Controller Dechert's audits for the years stated in them, because the accounts were not filed in the court of common pleas as required by the act of assembly. We think they were conclusive and ought to be. They were made by a competent officer in compliance with the law; were thorough with every opportunity for examination by the city; were recorded in audit books kept for that purpose. The officer paid over every dollar which the audit showed against him although the accounts were not filed; he could have done nothing more if they had been filed. It was the city's duty to file them for they remained in its possession. Both principal and sureties are now dead.

We are of opinion that under the express provisions of the Bullitt bill, it was the duty of the controller to audit the accounts of the health officer, and that in the absence of gross fraud practiced upon the controller, or collusion between him and the accounting officer, his official audit is conclusive upon the city. The filing in court is a very proper termination or consequence of the audit and the court would doubtless, on application by either the accounting officer or the city, have compelled such action, yet that is not the audit. To audit is to inspect vouchers, to scrutinize accounts, to hear witnesses, and then adjudge and record. All this was done by Controller Dechert; that ended the matter unless subsequent action was taken in court on appeal by one or other of the parties. There was no law either by decision or statute which authorized Controller Thompson to audit Controller Dechert's audits. The same principle more than once announced with reference to the duty of county auditors is pointedly applicable. Most of the cases as to the conclusiveness of a statutory audit are cited and commented on by AGNEW, J., in Blackmore v. Allegheny Co., 51 Pa. 160, and as he remarks in that case, "It is necessary for the peace and repose of society, that public officers should not be from year to year harassed and investigated by officers, otherwise as is said in Northampton County v. Yohe, 24 Pa. 305, if an annual board may re-open the accounts of two years

past they may on the same principle go back twenty years and upset their doings and thus interminable confusion be introduced instead of statutory system." The same ruling has been followed since in Westmoreland County v. Fisher, 172 Pa. 317, and Commonwealth v. Scanlan, 202 Pa. 250.

The fact that Patterson chose not to object to reaudits of Controller Dechert for the first four years and paid over the additional amount found by that controller, in no way estops him from now objecting to another audit of the same years by a new controller.

While we do not concur with the learned judge of the court below as to the consequence of not filing the audit in court, we do concur with him in his answer to the third reserved point that, "there was presented at the trial no legal proofs of default prior to 11th of September, 1890," and the judgment is affirmed.

Watkins, Appellant, *v.* Hughes.

Appeals—Final decree—Interlocutory decree—Quashing appeal.

An order directing a decree to be prepared in accordance with the findings of the trial judge in an equity suit, is not a final decree from which a decree may be taken.

The Supreme Court will not proceed even with the consent of the parties, in cases where no judgment or decree has been entered by the court below.

Equity—Findings of fact—Appeals—Review.

Findings of fact by the trial judge in an equity suit, based upon sufficient evidence, and approved by the court in banc, will not be reversed by the appellate court, except for manifest error.

Evidence—Witness—Party dead.

Where a party to a suit, otherwise incompetent by reason of the death of another, is called for cross-examination by the adverse party, and examined as to matters occurring in the lifetime of the decedent, he is thereby rendered a competent witness for himself on all relevant matters.

Argued Feb. 23, 1903. Appeal, No. 77, Jan. T., 1902, by plaintiff, from decree of C. P. Lackawanna Co., May T., 1898, No. 5, on bill in equity in case of Daniel R. Watkins et al. v. Benjamin Hughes. Before DEAN, FELL, BROWN, MESTREZAT and POTTER, JJ. Appeal quashed.

Bill in equity for an account. Before GUNSTER, J.

The case was heard on bill, answer and proof.

Exceptions were filed to the findings of fact and conclusions of law. On February 24, 1900, the court filed the following order:

The exceptions are overruled. Let a decree be drawn in conformity with the findings of fact and conclusions of law of the trial judge.

On September 9, 1901, the following agreement was filed of record:

Now, September 9, 1901, for the purpose of giving plaintiffs a decision of this court from which an appeal may be taken, it is agreed that the order of the court of February 24, 1900, be considered a decree of the court with like effect as if a formal decree in pursuance of such order had been made and filed of record this day.

Errors assigned were answers to various requests for findings of fact and of law, and certain rulings on evidence.

Charles L. Hawley, for appellant.

Everett Warren, of *Willard, Warren & Knapp*, with him *Taylor & Lewis*, for appellee.

OPINION BY MR. JUSTICE POTTER, July 9, 1903:

In the present case, there was no final decree in the court below. There was an order directing a decree to be prepared in accordance with the findings of the trial judge, but this was not done. That order was made on February 14, 1900, and even if it could be treated as a final decree, this appeal would be outside the statutory limit, and too late.

The agreement made by counsel, September 9, 1901, is not a decree and cannot be so regarded. This court will not proceed even with the consent of the parties, in cases where no judgment or decree has been entered by the court below: West's Appeal, 3 S. & R. 92.

The order of the court below is by its terms interlocutory, as it merely directs that a decree be drawn. When prepared it would have to be approved and entered by the court before it could take effect.

An order of court sustaining exceptions to the report of a referee is not a final decree or judgment from which an appeal can be taken: McGlue v. Phila., 105 Pa. 236.

An appeal will not lie except to a final decree of the court below: Eckfeldt's Appeal, 13 Pa. 171; Commonwealth v. Mitchell, 80 Pa. 57; Gesell's Appeal, 84 Pa. 238; Snodgrass's Appeal, 96 Pa. 420; Pennsylvania Steel Company's Appeal, 161 Pa. 571.

In the present case there is neither a final decree from which an appeal can be taken, nor is the entry of any decree assigned for error. The appeal must therefore be quashed.

A careful examination of the record, however, shows no substantial basis for an appeal, even if the decree had been formally entered. Most of the assignments of error relate to the findings of fact by the trial judge. There was evidence sufficient to sustain these findings and they were approved by the court in banc. There is no such clear error apparent as would warrant an appellate court in disturbing the findings of the trial judge.

The case turned mainly on the question whether the alleged signature of the defendant to the assignment of a one-half interest in a lease was genuine or forged. The trial judge found as a fact that the signature was forged and further found that Watkins was merely an employee of the defendant up to the time of his death. The authorities cited by appellants are all upon the question of the liability of a trustee to account. There is no doubt as to the propositions of law there stated, but the court below has found as a fact that the relation between Hughes and Watkins was that of employer and employee, not that of trustee and cestui que trust.

Watkins was to receive one half the profits of the business and the evidence is undisputed, and the court so found, that settlement in full was made for all profits accruing up to the date of his death. There was no trust existing between Hughes and Watkins, if the court's findings of fact are to be sustained and the authorities cited in behalf of the plaintiffs have therefore no application. The testimony of the defendant, Hughes, although it strengthened his case, was not necessary to justify a finding in his favor. The trial judge allowed him to testify because the plaintiff had called him for cross-exami-

nation, and thereby in the opinion of the court made him competent.

Where a party to the suit, otherwise incompetent by reason of the death of another, is called for cross-examination by the adverse party, and examined as to matters occurring in the lifetime of the decedent, he is thereby rendered a competent witness for himself on all relevant matters: Corson's Estate, 137 Pa. 160; Boyd v. Conshohocken Worsted Mills, 149 Pa. 363; Bair v. Frischkorn, 151 Pa. 466.

The testimony clearly shows that Hughes was examined by the plaintiffs when called for cross-examination as to matters which occurred in the lifetime of the decedent. This rendered him a competent witness as to other matters relevant thereto.

The appeal is quashed.

Custer, Appellant, *v.* Baltimore & Ohio Railroad Company.

Negligence—Province of court and jury.

The definition of negligence and the determination of a standard of duty is always a matter of law for the court. In case of dispute it is for the jury to say whether the facts come within the standard. Where the facts are clear and nothing remains but the definition and application to them of the rule of conduct, the responsibility is upon the court alone.

Negligence—Railroad—Speed of train—Crossing.

There is no limit to the rate of speed at which a railroad company may run its trains through the open country and over the crossings of country roads, so long as the bounds of safety to patrons are not transgressed.

In cities, towns and populous districts the speed of trains must be moderated, or else the railroad must take reasonable precautions to make it safe for the public who have occasion to cross its tracks.

Where a railroad has placed gates across a highway and has stationed a watchman there, to protect travelers on the highway, it may run its trains at high speed at that point, even if it be within the limits of a municipality or in a populous district.

In an action against a railroad company to recover damages for the destruction of two horses and a wagon, the evidence is insufficient to submit to the jury which is in effect that plaintiff's team in attempting to pass over a grade crossing in a populous suburb became stalled on

the tracks of the railroad by reason of snow and ice on the planking; that before the horses could be unhitched, a train running at the schedule rate of sixty miles per hour reached the crossing and killed the horses; that an effort was made by the employees of the railroad to give notice to the approaching train by dispatching a man towards it with a red flag; that the crossing could be seen at a distance of some 4,400 feet looking through a tunnel, and that a block signal about seventy-five feet beyond the crossing was set to hold the train; but that the engineer was unable to stop the train after seeing the signal before the point of collision; that the crossing was protected by gates in charge of a gateman; that no complaint was made of the gates or of the gateman, and that the wagon had ample time to make the crossing before the approach of the train had it not been stalled in the manner described.

Argued Feb. 9, 1903. Appeal, No. 119, Jan. T., 1902, by plaintiff, from judgment of Superior Court, Oct. T., 1901, No. 40, affirming order of C. P. Del. Co., March T., 1899, No. 193, in case of Isaac R. Custer v. Baltimore and Ohio Railroad Company. Before MITCHELL, DEAN, BROWN, MESTREZAT and POTTER, JJ. Affirmed.

Appeal from Superior Court.

The facts are stated in the opinion of the Supreme Court and in 19 Pa. Superior Ct. 365.

Error assigned was the judgment of the Superior Court.

Oliver B. Dickinson, for appellant.

William B. Broomall, for appellee.

OPINION BY MR. JUSTICE POTTER, July 9, 1903:

The trial court entered judgment of compulsory nonsuit in this case, and refused upon motion, to take it off. The Superior Court affirmed the judgment of the trial court, and its action in so doing, is here assigned as error.

The appellant contends that he was entitled to have the jury pronounce upon the effect of the facts, which were undisputed, and that it, rather than the court should have determined whether the defendant was negligent. But as the conduct of the parties is not in dispute, and as all the facts appear clearly and distinctly in the evidence, and there is no conflict in the testimony, the only question for decision was as to the legal effect, or value of the facts.

Whenever the facts are ascertained, the rule of conduct, or in other words, the rule of law to be applied is to be determined and laid down by the court, and is not to be left to be defined by the accidental feelings of a jury. It would be an easy way for the court to avoid responsibility, when the circumstances are complex, or the question is difficult, to throw the whole case in a lump to the jury. But to do this, when as in the present instance, no doubt exists as to the actual conduct of the parties, and where none of the facts are in dispute, would be an evasion of duty and the surrender of a judicial function.

The law tends constantly towards the attainment of greater certainty of definition, and to the substitution of specific rules of conduct, instead of featureless generalities. It is always desirable that the standard by which parties are judged, should be one of specific acts or omissions, with reference to the special circumstances of the case. It has been well said in Holmes Lectures on the common law that "if in the whole department of unintentional wrongs, the courts arrived at no further utterance than the question of negligence, and left every case without rudder or compass to the jury, they would simply confess their inability to state a very large part of the law which they require the defendant to know, and would assert by implication, that nothing could be learned by experience."

Hence the long and growing line of decisions, in which, instead of relying upon the vague and uncertain estimate of a jury, as to the degree of care which would be exercised under the circumstances by a prudent man, there has been substituted the more precise and definite rule of certain specific acts, whose existence or omission constitute negligence.

The definition of negligence and the determination of a standard of duty is always a matter of law for the court. In case of a dispute it is of course for the jury to say whether or not the facts come within the standard. But where the facts are clear and nothing remains but the definition and application to them of the rule of conduct, the responsibility is upon the court alone.

In the present case this responsibility was properly assumed and carefully discharged by the trial court. The conclusion reached by it is so well vindicated, and the case is so fully dis-

cussed in the opinion of the Superior Court in affirmance of the court below that little remains to be said.

The accident occurred at a grade crossing in a populous district. The defendant company had provided safety gates and a watchman to protect travelers upon the highway. The train which caused the damage was running at a high rate of speed, probably sixty miles an hour, and the engineer was unable to stop in time to avoid the collision. The plaintiff's horses were smooth shod, and in approaching the crossing, the team was stalled so that instead of passing at once and directly across the tracks, it remained upon the line of the railroad for about four minutes until the train came.

The watchman was not in any way at fault in permitting the driver and horses to enter upon the crossing when they approached, for there was ample time to have crossed and recrossed in safety had the team proceeded in the ordinary way and with the usual celerity. Even after it was seen that there was some difficulty, it was not at once apparent that the wagon could not be moved in time to escape the coming of the train. As soon as there was cause to believe that a collision was imminent, every one in the vicinity seems to have done everything which it was reasonably possible to do to stop the train and avoid the accident.

The evidence shows that the engineer too used his utmost efforts as soon as he saw and comprehended the danger. The accident was simply the result of an unusual and exceptional occurrence, viz: the stalling of the team upon the edge of the track and its remaining there for some considerable time. The defendant company had sought to make it safe for the public to cross its tracks at this point by providing safety gates and a watchman, and there was no failure in the use of the means thus provided nor any neglect of duty in connection therewith. It went upon the theory that its tracks would thus be kept clear, and it acted upon that assurance rather than upon the ability to stop its trains after coming in sight of the crossing before reaching it.

We find nothing in the evidence which would have warranted a verdict against the defendant, unless it is to be held that it was negligence under the circumstances to run trains through the vicinity at a speed of sixty miles per hour.

Each of the tribunals which have had this case under consideration have reached the conclusion that in the light of the present day conditions and the popular demand, such a rate of speed cannot be considered negligent when proper means are taken to protect the public who use the crossings in the ordinary way.

An examination of the decisions in Pennsylvania shows that they sustain these propositions.

1. There is no limit to the rate of speed at which a railroad company may run its trains through the open country and over the crossings of country roads, so long as the bounds of safety to patrons are not transgressed: Reading, etc., R. R. Co. v. Ritchie, 102 Pa. 425; Newhard v. Penna. R. R. Co., 153 Pa. 417.

2. In cities, towns, and populous districts, the speed of trains must be moderated, or else the railroad must take reasonable precautions to make it safe for the public who have occasion to cross its tracks: Phila. & Reading R. R. Co. v. Long, 75 Pa. 257; R. R. Co. v. Ritchie, supra; Ellis v. Lake Shore, etc., Ry. Co., 138 Pa. 506; Childs v. Penna. R. R. Co., 150 Pa. 73, 76; L. V. R. R. Co. v. Brandtmaier, 113 Pa. 610.

The conclusion which was reached by the trial court in this case would seem to follow naturally, that where a railroad has placed gates across a highway and has stationed a watchman there, to protect travelers on the highway, it may run its trains at high speed at that point, even if it be within the limits of a municipality or in a populous district.

Grade crossings are always obnoxious, as they are a constant menace to public safety, and their continued existence is much to be deplored. But this is not a question as to the establishment or the regulation of a grade crossing. The conditions which prevail at the place of the accident seem to be of long standing, although the growth of traffic and the demand for increased speed have probably added to the danger.

We agree with the view taken by the trial court, and approved by the Superior Court, that a high rate of speed is demanded of railroad companies by the traveling public, and that such a rate is sanctioned by the law, where the usual and proper means are taken to guard the crossings and make them reasonably safe for those desiring to use them.

We can only suggest that this case presents another illustra-

tion of the wisdom of the policy which prohibits wherever it is possible to do so, the crossing of steam railroads at grade. So long as they are permitted to exist, even where as here, all reasonable precautions to secure safety in the ordinary use of the crossing are taken, danger from sudden breakdown, or other exceptional cause, will always be present.

The assignments of error are overruled, and the judgment is affirmed.

Bousquet's Estate.

Escheats—Disappearance of legatees—Statute of limitations—Act of May 2, 1889, P. L. 66.

The right of the commonwealth to escheat a legacy is barred by section 26 of the act of May 2, 1889, where it appears that the legatee disappeared prior to the death of the testator, that he never claimed the legacy although search and advertisement was made for him, and that the commonwealth did not institute escheat proceedings until more than forty years after the death of the testator.

Appeals—Statement of question and issue—Escheator's compensation and counsel fee.

The Supreme Court will not consider the question of compensation and counsel fee of a deputy escheater of the commonwealth where no such question was raised in the court below, and is not included in the statement, in the appellant's paper-book, of the question involved in the case.

Argued March 26, 1903. Appeal, No. 49, Jan. T., 1903, by Commonwealth, from decree of O. C. Phila. Co., Oct. T., 1886, No. 157, dismissing exceptions to adjudication in estate of Peter Bousquet, deceased. Before MITCHELL, FELL, BROWN, MESTREZAT and POTTER, JJ. Affirmed.

Exceptions to adjudication.

The facts are stated in the opinion of the Supreme Court.

Errors assigned were in dismissing exceptions to adjudication.

Frederick J. Knaus, for appellant.—While it is true that the law raises a presumption of death by reason of the absence

of the individual for a period of seven years, yet that absence must be coupled with the fact that he must have been absent from his home or place of domicile and not have been heard from by those with whom he would have naturally communicated.

The absentee must have been absent from his home or place of residence: Francis v. Francis, 180 Pa. 644, 646.

Julius Novial was originally a resident of Philadelphia and then removed to Porto Rico; there is no presumption of his death; on the contrary there is a distinct and positive presumption that he was still living when heard from at Porto Rico, that he still continues to live: Francis v. Francis, 180 Pa. 644, 646, 647.

Even if there were doubt as to whether or not the twenty-sixth section of the act applied to sections two and three, such doubt must be resolved in favor of the appellant. The appellant is the commonwealth of Pennsylvania. If the commonwealth is to be debarred, it must be by some explicit, express statutory provision intended so to bar. The ordinary statutes of limitation do not apply to the commonwealth: Com. v. Baldwin, 1 Watts, 54, 56; McKeehan v. Com., 3 Pa. 151, 153; Com. v. Hutchinson, 10 Pa. 466; Troutman v. May, 33 Pa. 455, 459.

But it is respectfully submitted that the twenty-sixth section was not intended to apply to cases arising under the second and third sections of the act, but only to the first section.

Anthony A. Hirst, with him *James Fitzpatrick*, for appellee.—When the commonwealth comes into its courts, it is subject like all other suitors to the established rules of evidence. It must meet the burden of proof, its evidence must be relevant, material, the best attainable, and must be presented in due order, under the regular rules of procedure. In all such respects it stands upon the same footing as ordinary litigants. Rules of evidence and legal presumptions are not changed for or against the state as a suitor: Ash's Estate, 202 Pa. 422.

The Supreme Court of Pennsylvania, in the leading case of Burr v. Sim. 4 Wharton, 150, adopted the English rule that in the case of an absent person, of whom no tidings are received, the presumption of the continuance of life ceases at the end of seven years.

Opinion by Mr. Justice Potter, July 9, 1903:

Peter Bousquet died at Philadelphia, September 28, 1861, leaving a will dated February 9, 1859, by which he gave to one, Julius Novial, the sum of $1,000. Prior to 1860, Julius Novial resided on the island of Porto Rico, but about that time he left in a ship bound for San Francisco. He has never been heard from since and has never appeared to claim his legacy, although search and advertisement were made for him. On the settlement of the account of Bousquet's executrix, the accountant was ordered to invest the legacy and hold it subject to the order of the legatee. The money still remains in the hands of the administrator d. b. n. c. t. a. of Peter Bousquet, deceased, and with its accumulations, now amounts to more than $8,000.

On October 28, 1901, Alexander D. Lauer was commissioned deputy escheator in the case of Julius Novial, deceased, and on December 7, 1901, petitioned the orphans' court to order Charles Tete, Jr., administrator d. b. n. c. t. a. of Peter Bousquet, to file an account. This was ordered, and upon the audit on May 8, 1902, the commonwealth by its deputy escheator, claimed the entire fund which was made up solely of the legacy to Novial and its accumulations. The auditing judge declined to allow this claim on the ground that it was barred by the 26th section of the Act of May 2, 1889, P. L. 66, and awarded the balance in the hands of the accountant to the residuary legatees under the will of Peter Bousquet, deceased. The commonwealth filed exceptions to the adjudication which after argument were dismissed by the court in banc and the adjudication was confirmed.

From this decree the commonwealth appealed, and the dismissal of the exceptions and confirmation of the adjudication are here assigned for error. The questions for consideration are:

1. Whether the claim of the commonwealth to an escheat was barred by the 26th section of the act of May 2, 1889, as no proceedings were taken within twenty-one years after the presumed death of Julius Novial.

2. Whether the court below should have awarded compensation and counsel fee to the deputy escheator. It does not appear, however, that any such claim was made at the audit or passed upon by the auditing judge.

The material portions of the Act of May 2, 1889, P. L. 66, are as follows:

"Section 1. Be it enacted, etc. That from and after the publication of this act, if any person, who at the time of his death was seized or possessed of any real or personal estate within this commonwealth, has died or shall die intestate, without heirs or known kindred, a widow or surviving husband, such estate of whatsoever kind the same may be, whether legal or equitable, or whether the same was held by the said person in severalty or as tenant in common, cotenant, joint-tenant or in partnership with any other person or persons, shall escheat to the commonwealth, subject to all legal demands on the same.

"Section 2. That whensoever any money, estate or effects shall have been, or shall hereafter be paid into, or deposited in the custody of any court of this commonwealth or shall be in the custody of any depository, or of any receiver or other officer of said court, and the rightful owner or owners thereof shall have been or shall be unknown for the space of seven years, the same shall escheat to the commonwealth, subject to all legal demands on the same.

"Section 3. That whensoever any trustee or other person is or shall be seized of any property or estate, real or personal, in a fiduciary capacity, and shall file an account of the same in any court of this commonwealth, and whensoever it shall appear that the cestui que trust or beneficial owner of said property or effects, or any part thereof, has been unknown for a period of seven years, and still remains unknown, then and in such case, so much of said property or effects as belonged to said unknown cestui que trust, or beneficial owner, shall escheat to the commonwealth, subject to all legal demands on the same.

"Section 26. That whensoever any property hath escheated or shall escheat to the commonwealth by reason of the death of the owner last seized or possessed thereof, intestate without heirs or known kindred, a widow or surviving husband, and there have been no proceedings had, as and for an escheat, for the period of twenty-one years after the decease of the said owner, the commonwealth shall thereafter forever be debarred from claiming the same as escheated, and that whether such period hath already elapsed, or whensoever hereafter it shall have fully elapsed."

The fund which is here claimed has not been paid into court and is not in the custody of any depository or officer of the court. It is in the hands of the administrator of Peter Bousquet, by whom it has been held and invested, to await the appearance of the legatee. The facts do not therefore come within the second section of the act. Neither does the third section apply, for that extends to cases where the relation of trustee and cestui que trust exists. There is no such relation here. Upon the death of the testator, the legacy became vested in Julius Novial and it remained as his property, and is not subject to any trust.

Both the second and third sections would seem to apply only to cases where the owner of a fund in court or the cestui que trust or beneficial owner of a trust fund, have been unknown for a period of seven years. In the present case, the owner of the fund has never been unknown. It is his present whereabouts that are unknown. If there is any escheat, therefore, in this case, it must be under the first section of the act and by reason of the claim that Julius Novial died intestate and without heirs or known kindred, or widow. There is no direct evidence of his death. If a presumption of death exists, it must have arisen at the expiration of seven years from the year 1860, when he was last heard of, or in 1867. The proceedings to escheat the fund were not begun until 1901, more than twenty-one years after that date. It can hardly be contended that the twenty-sixth section of the act of 1889 does not apply to cases arising under the first section of that act. The commonwealth itself in providing for the escheat of property has limited the time in which the proceedings must be instituted. Its claim to an escheat in this case is, therefore, clearly barred. The suggestion that the deputy escheator and his counsel should be compensated out of the fund, does not appear to have been made upon the audit, and is not passed upon in the adjudication. Furthermore, the question is not included in the statement in the appellant's paper-book, of the question involved in the case, and therefore it will not be considered: 5th Ward Bldg. & Loan Asso. v. Boylan, 198 Pa. 250.

The assignments of error are overruled and the decree of the orphans' court is affirmed.

Wadasz, Appellant, v. Arcade Real Estate Company.

Statutes—Repugnant proviso—Building laws—Collateral support—Act of June 8, 1893, sec. 8, P. L. 360—Philadelphia.

The latter part of section 8 of the Act of June 8, 1893, P. L. 360, which reads: "Should any owner or owners desire to excavate to a depth of more than ten feet, he or they shall protect and underpin the wall of an adjoining structure at his or their own expense; provided, however, that this section shall not apply to buildings now erected or to dwelling houses," is not intended to apply to all buildings, but only in the future to certain classes of buildings, i. e. buildings other than dwelling houses erected after the passage of the act. With this intent the proviso is entirely consistent, and both the section and the proviso can stand.

Argued March 27, 1903. Appeal, No. 68, Jan. T., 1903, by plaintiff, from judgment of C. P. No. 4, Phila. Co., June T., 1901, No. 3839, on verdict for defendant in case of William A. Wadasz v. Arcade Real Estate Company. Before MITCHELL, FELL, BROWN, MESTREZAT and POTTER, JJ. Affirmed.

Trespass to recover damages for injuries to a leasehold estate. Before AUDENRIED, J.

At the trial counsel for plaintiff offered to prove under section 8, of the act of June 8, 1893, that the building No. 18 South Broad street was an office building and had been adapted to office purposes, and was not a dwelling house; that there was no underpinning or protection of the wall of the structure No. 18 South Broad street made by the Arcade Company, the owner of the adjoining lot upon which excavations were being made at the time of the collapse. Also, that the excavations of the lot No. 20 South Broad street exceeded the depth of ten feet. This is to be followed by proof that in consequence of said lack of underpinning the wall of the building No. 18 South Broad street, that is, the wall adjoining the premises of the defendant, fell down, resulting in injury to the plaintiff and to show damages.

The court overruled the offer, and sealed a bill. [1]

Plaintiff closed his case and the defendant offered no testimony.

The court thereupon gave binding instructions for defendant.

Verdict and judgment for defendant. Plaintiff appealed.

Errors assigned were (1) rulings on evidence; (2) binding instructions for defendant.

Hampton L. Carson, with him *Charles Lex Smyth*, for appellant.—A proviso repugnant to the body of a statute is void: Potter's Dwarris on Statutes, p. 118; Dollar Savings Bank v. United States, 86 U. S. 227; Dugan v. Bridge Co., 27 Pa. 303; Com. ex rel. v. Hough, 22 Pa. C. C. Reps. 440.

John Hampton Barnes, with him *George Tucker Bispham*, for appellee.—The appellant's first proposition of law is founded upon the premise that the proviso is repugnant to the body of the statute. This is not applicable to the proviso in the said eighth section. The eighth section of the act read with the proviso as a part thereof created certain regulations in respect to the construction of buildings, other than dwelling houses, thereafter erected, and for the support of buildings other than dwelling houses thereafter erected. The purpose was to thus limit the application of the act.

The appellant's argument that the court should read into the act the word "being" before the word "erected" would, if adopted, change the entire effect and purpose of the act. A court has no power to insert any words in an act unless there be a patent ambiguity or a plain omission in the act: Sener v. Borough of Ephrata, 176 Pa. 80.

It is a rule of construction well established in this state that a statute should be construed prospectively if possible: Taylor v. Mitchell, 57 Pa. 209; Thomas's Election, 198 Pa. 546; Seabolt v. Commissioners, 187 Pa. 323; Com. v. Charity Hospital, 198 Pa. 270; Com. v. Mintz, 19 Pa. Superior Ct. 283; Stegmaier v. Jones, 203 Pa. 47.

Opinion by Mr. Justice Fell, July 9, 1903:

The single question presented by this appeal is whether the eighth section of the Act of June 8, 1893, P. L. 360, which regulates the construction, maintenance and inspection of buildings in Philadelphia, imposed on the defendant the duty to underpin and protect the wall of a building on an adjoining lot. The first part of the section requires the owner of a building to sustain his wall erected on or near a boundary

line, or to pay the cost of making the building secure when excavations are made on the adjoining land to a depth not exceeding ten feet. The latter part of the section requires an owner of premises on which an excavation is made to a greater depth than ten feet to underpin and protect the wall of an adjoining structure. This part of the section is as follows: "Should any owner or owners desire to excavate to a depth of more than ten feet, he or they shall protect and underpin the wall of an adjoining structure at his or their own expense; provided, however, that this section shall not apply to buildings now erected or to dwelling houses."

It is conceded that the defendant is not liable for the destruction of the building occupied by the plaintiff as a tenant unless made so by the act of 1893, because prior to that time the owner of premises was required only to support the land of an adjoining owner in its natural state, and not to support buildings erected thereon. The building destroyed was erected before the passage of the act, and the proviso makes the section inapplicable in this case. It is, however, contended by the plaintiff that the proviso as written is void, because repugnant to the section whose operation it is intended to qualify and limit, and that it should either be struck out altogether or construed as applying only to the first part of the section, or as excepting from the operation of the act buildings now being erected instead of "buildings now erected."

This contention cannot be sustained. The proviso only limits the application of the section in accordance with the legislative intention to establish regulations for the future for the construction of certain kinds of buildings. The act is a comprehensive one, creating a bureau of building inspection, defining its powers and establishing many new regulations to be observed in the construction of buildings and providing means for their enforcement. Generally these regulations are meant to apply to buildings of unusual size, erected for business purposes. Many of the regulations would be useless and unnecessarily burdensome if applied to small buildings or to dwelling houses. The seventh section of the act, which provides for the laying of foundations, has a proviso authorizing the building inspectors to exempt buildings from its requirements "when it appears that buildings are located on a street that is

not likely to be used for business purposes." The tenth and eleventh sections, which relate to the construction of base courses and foundation walls, are expressly made not to apply to dwelling houses. The eighth section imposes on owners thereafter erecting buildings other than dwelling houses the duty of supporting their own walls to the depth of ten feet, and extends the common-law right of lateral support of land in its natural state to land on which buildings have been erected, where an excavation is made to a greater depth than ten feet, by requiring the second builder to support both land and building. Read without its proviso, this section would impose the duty of lateral support in all cases. This would make the section retroactive, and would work injustice by requiring an owner whose building was constructed in accordance with the then existing building laws to underpin and support it, and by imposing on a builder the duty of supporting a building difficult to support because of its inadequate foundations. It may have been thought unnecessary to make the act apply to dwelling houses, since foundations ten feet below the surface are not usually necessary for their support, and the duty of supporting them in addition to the land is slight. It was deemed wise to change the law in regard to lateral support because of the changed conditions brought about by the construction of buildings requiring exceptionally deep foundations, and the line was arbitrarily fixed for the future at ten feet below the surface.

In deciding the question raised, we need look only to the legislative intention. This we find to be not that the act should apply to all buildings, in which case the proviso would be repugnant, but that it should apply in the future to certain classes of buildings. With this intent the proviso is entirely consistent, and both the section and the proviso can stand.

Since the language of the act is intelligible and clear, there is no room for construction.

The judgment is affirmed.

James Smith Woolen Machinery Company, Appellant, *v.* Browne.

Mechanic's lien—Oil and gas wells—Act of June 17, 1887, *P. L.* 409.—*Labor—Materials—Leasehold.*

(1) A claim filed under the act of June 17, 1887, "for materials delivered and labor furnished" is invalid, as the act only provides a lien for labor; (2) A claim filed against "all that certain lot or piece of ground with the factory building . . . . improvements thereon, and the curtilage appurtenant thereto," is invalid, inasmuch as the intent of the act was to give a lien only against a tenant's interest in severable machinery on the land; (3) A claim against all the machinery on the premises is invalid, inasmuch as the act gives a lien against machinery only on which construction work was done.

It seems probable that the Act is applicable only to oil or gas leases or similar mineral and mining rights in land.

Not decided whether a claim filed "for materials delivered and labor furnished" is invalid as to labor furnished,

Constitutional law—Amendments of statutes—Mechanic's lien—Article 3, *section* 6, *of the constitution—Act of June* 17, 1887, *P. L.* 409.

When there is an established system of procedure in certain cases, whether it be by common law or statute or joint operation of both, a new act applying such system to a new class of cases by general reference to it, is not a violation of section 6, article 3, although it may operate to some extent as an extension of a previous statute.

The Act of June 17, 1887, P. L. 409, giving a lien for labor for or about certain construction work, and providing that the proceedings shall be such as "now provided by law in case of mechanics' liens," does not transgress the prohibition of section 6 of article 3 of the constitution, relating to amendments of statutes.

Argued March 27, 1903. Appeal, No. 11, Jan. T., 1903, by plaintiff, from order of C. P. No. 2, Phila. Co., Sept. T. 1900, No. 1308, M. L. D., refusing to take off nonsuit in case of James Smith Woolen Machinery Company v. William Browne, Owner, and William Browne et al., trading as Phenix Mills Company, Contractors and Lessees. Before MITCHELL, FELL, BROWN, MESTREZAT and POTTER, JJ. Affirmed.

Scire facias sur mechanic's lien. Before WILTBANK, J.

The lien filed in this case was a claim "against all that certain lot or piece of ground with the factory building called

the Schuylkill Factory and other buildings and improvements thereon erected and the machinery, steam engines and boilers in and about the same of every kind and description situate in Manayunk in the Twenty-first Ward of the said City of Philadelphia, described as follows, to wit: . . . .

The said sum . . . . being a debt contracted by the said Contractors and Lessees for material delivered and labor furnished by the said Claimant directly to the said Lessees for and about the construction of certain engines, machinery, shafting, hangers, pulleys, &c., erected on and added to the above described premises, which material, with the time of its delivery, and the doing of said work, and the amount due on each, are more particularly described in the Bill of Particulars annexed hereto, which Bill the Claimant prays may be taken and considered as part of this lien against said building with the machinery therein, of which the said William Browne, then was and now is the reputed owner, and the said William Brown, Samuel C. Browne, Bernard S. Browne, and William Anderson, Jr., Copartners trading as the Phenix Mills Company, were and now are the lessees, which said material and labor was commenced on the sixteenth day of March, 1900, and the last work and material delivered to said building was on the twenty-ninth day of September, 1900.

Wherefore, the said James Smith Woolen Machinery Company claim to have a lien on said building, with the improvements thereon and the curtilage appurtenant thereto, together with the engines, machinery, shafting, hangers, pulleys, &c., therein and thereon."

The first section of the Act of June 17, 1887, P. L. 409, is as follows: That all persons performing labor or furnishing labor for or about the construction of any engine, house, derrick, tank, buildings, machinery, wood or iron improvement, construction or erection upon any leasehold, either by written or verbal lease, or for boring, drilling or mining of any lease or lot as aforesaid, for the development or improvement of the same, whether such labor is or may be done by day, month or year, or by contract, for the tenant or tenants, lessee or lessees of such lot, or lease, or parcel of land, or for their use or benefit, shall have a lien upon such engine or engines, engine house, derrick, tank, building, machinery, wood or iron improvement,

oil wells and fixtures, on said lot or leasehold itself, for the price and value of such work and labor: Provided, that the lien hereby given shall extend only, as to such lease or lot, to the interest of the lessee or lessees, tenant or tenants therein: And provided further, that when the materials were furnished or labor performed by others, than the original contractor or contractors, they shall notify the owner or owners, or reputed owners of the leasehold property of his or their intention to file a mechanic's lien, and unless such notice be given no such lien shall be filed nor be of any validity.

The court entered a compulsory nonsuit which it subsequently refused to take off.

Error assigned was in refusing to take off nonsuit.

W. Horace Hepburn, with him *William A. Carr* and *Sidney L. Krauss*, for appellant.—The Act of June 17, 1887, P. L. 409, is constitutional: Searight's Est., 163 Pa. 210; Greenfield Ave., 191 Pa. 290; Strawick v. Munhall, 139 Pa. 163.

The appellant fully complied in every particular with the requirements of the act.

The act does not require the claim filed to set forth the precise nature of the appellee's interest, or that it is a mere leasehold: Thomas v. Smith, 42 Pa. 68; McCristal v. Cochran, 147 Pa. 225.

Joseph DeF. Junkin, with him *H. S. Prentiss Nichols*, for appellees.

Opinion by Mr. Justice Mitchell, July 9, 1903:

The plaintiff's claim rests entirely on the Act of June 17, 1887, P. L. 409, and therefore a substantial if not a strict compliance with the requirements of the statute is essential to its validity. But examination shows an entire failure of such compliance.

The claim is filed "for materials delivered and labor furnished." The statute gives a lien only for "performing labor, or furnishing labor for or about the construction," etc. It is very carelessly drafted (probably as suggested by McIlvaine, J., in McKeever v. Victor Oil Co., 9 Pa. C. C. Rep. 284, from negli-

gent copying of section 2 of the local Act of Venango county April 8, 1868, P. L. 752, or of the Act of June 28, 1879, P. L. 182) and the subsequent phrase in the same section "provided further that when the materials were furnished or labor performed by others," etc., suggests it as not improbable that the first sentence was intended to be "performing labor or furnishing materials," etc. But that is the enacting clause, "all persons performing labor or furnishing labor . . . . shall have a lien . . . . for the price or value of such work and labor," and being clear and no other lien being given, we are not at liberty to supply one by reference to any supposed intent. It is said in the argument that the claim for materials was abandoned at the trial, but even if so, it is not clear that a purely statutory claim which is defective because in excess of the statutory authority, can be cured by the abandonment of the excess. This, however, it is not necessary to decide as there are other objections which are insuperable.

Secondly the claim is filed against "all that certain lot or piece of ground with the factory building," etc. (describing it by metes and bounds), and is for "a lien on said building with the improvements thereon, and the curtilage appurtenant thereto." No such lien is authorized by the statute. The parties entitled to a lien are those performing or furnishing labor "for or about the construction of any engine house, derrick, truck, buildings, machinery, wood or iron improvement, construction or erection upon any leasehold, either by written or verbal lease, or for boring, drilling or mining of any lease or lot as aforesaid, for the development or improvement of the same," and the lien given is "upon such engine or engines, engine house, derrick, tank, building, machinery, wood or iron improvement, oil wells and fixtures, on said lot or leasehold itself, for the price or value of such work and labor. Provided, that the lien hereby given shall extend only, as to such lease or lot, to the interest of the lessee or lessees, tenant or tenants therein." This lien is not in any case upon the land itself, but at most upon the lessee's interest in it, and even this latter is confined to labor furnished "for boring, drilling or mining of any lease or lot for the development or improvement of the same;" in all other cases the lien is expressly confined to the specific machinery, etc., on which the labor was supplied, the intent apparently

being to give a lien on what may be described generally as trade fixtures or improvements, but as a lien limited to the oil well itself or other result of "boring, drilling or mining" would be impracticable, the lien in such case is extended to the lessee's interest in the land. If this construction were at all doubtful it would be made entirely clear by the fifth section of the act which provides that after the filing of any claim "it shall not be lawful for any owner or owners, contractor or contractors, lessee or lessees, tenant or tenants, of any property named and described in such statement of claim, or their assigns or sub-lessees, to remove or attempt to remove the same from such lot, lease or parcel of land, while the said claim remains unpaid, pending and undetermined." The "property named and described in such statement of claim" is thus clearly indicated to be not the land nor even the lessee's interest in it, but the severable machinery, etc., which is intended to be the specific subject of lien.

The claim in the present case is not within the act. It is very questionable regarding the act as a whole whether it is intended to apply to any but oil or gas leases or similar mineral and mining rights in land. All the terms used are directly applicable to such leases and are not applicable to leaseholds for manufacturing or similar purposes without some straining. But passing this objection, the plaintiff's claim as already noted, is for a lien on the land itself, the building, and curtilage, and even if it could be construed as intended to be only against the lessee's interest, it is still unauthorized for it is not for "boring, drilling, or mining," the only case in which the act authorizes a lien against the leasehold estate itself.

Further, the claim is for material and labor for "the construction of certain engines, machinery, shafting, hangers, pulleys, etc., erected on and added to the above described premises." The bill of particulars makes it doubtful whether a large part if not the whole claim is not for repairs rather than construction, but in any view the lien asserted, on the building and curtilage (already discussed) and upon "the engines, machinery, shafting, hangers, pulleys, etc., therein and thereon," not limited to those upon which work was done, but including all in the building, is far in excess of any authorized by the act. See St. Clair Coal Co. v. Martz, 75 Pa. 384.

The constitutional objection that the act transgresses the prohibition of section 6 of article 3 cannot be sustained.

Section 4 of the act provides that "proceedings to enforce the collection of claims shall be as is now provided by law in case of mechanics' liens" except that in certain cases publication is required in addition to posting on the premises. This is not a violation of the letter or spirit of that section of the constitution, which has reference to express amendments only. When there is an established system of procedure in certain cases, whether it be by common law or statute or joint operation of both, a new act applying such system to a new class of cases by general reference to it, is not a violation of section 6, article 3, although it may operate to some extent as an extension of a previous statute: In re Greenfield Avenue, 191 Pa. 290.

It may be that the present act will encounter practical difficulties in its administration, such as is suggested in the matter of judgment and execution by scire facias on a lien on personal property. This and similar questions must be left to be dealt with as they arise. But the act may prove nugatory and impracticable in application and yet not be unconstitutional for any of the reasons at present assigned.

Judgment affirmed.

Sprigg, Appellant, *v.* Commonwealth Title Insurance and Trust Company.

Equity—Equity jurisdiction—Remedy at law.

Where no decree is sought but one for the payment of money, which can be as easily recovered in an action at law, and there are no mutual demands, nor complicated accounts nor discovery sought, the case is not one of specific relief, and consequently does not fall within the equity head of granting relief where a recovery in damages would be an inadequate remedy.

Equity—Equity jurisdiction—Remedy at law—Corporations—Mortgage—Suit against trustee.

Where a corporation mortgage provides that the trustee shall not certify an issue of bonds until money sufficient to pay the first four coupons has

been paid to the trustee, and the trustee by the direction of the corporation agrees to hold certain of the bonds in trust to secure the performance of a contract on the part of the corporation, without requiring the deposit of any money to pay the first four coupons, the person for whom the bonds are held in trust cannot maintain a bill in equity against the trustee to recover damages for failure to have in hand the money for the coupons, or for alleged false allegations as to title of the mortgaged premises made by the trustee to such person.

Where a trustee of a corporation mortgage agrees not to issue bonds until a sum sufficient to pay the first four coupons are deposited with it, and certain persons to whom the bonds are issued deposit the amount of the four coupons, and subsequently receives such amount back, the trustee is not liable to other parties for such repayment.

Equity—Equity jurisdiction—Remedy at law—Account render.

While the act of October 13, 1840, confers concurrent jurisdiction upon courts of equity in all cases where account render previously lay, the jurisdiction of the court which first takes actual cognizance of the controversy becomes exclusive in the absence of any peculiar equitable grounds to the contrary.

Argued March 31, 1903. Appeal, No. 323, Jan. T., 1902, by plaintiff, from decree of C. P. No. 2, Phila. Co., Dec. T., 1898, No. 381, dismissing bill in equity in case of Carroll Sprigg v. Commonwealth Title Insurance and Trust Company. Before MITCHELL, FELL, BROWN, MESTREZAT and POTTER, JJ. Affirmed.

Bill in equity to enforce an alleged trust and for an account. Before WILTBANK, J.

The facts are stated in the opinion of the Supreme Court.

Error assigned was decree dismissing the bill.

Thomas Leaming, for appellant.—The bill, being by a cestui qui trust against a trustee praying an account, equitable distribution of trust funds and a surcharge for an inequitable distribution, is within the general jurisdiction of equity: Bispham's Equity, sec. 135, page 197; Rhinelander v. Farmers' Loan & Trust Co., 172 N. Y. 519 (63 N. E. Rep. 599); Frishmuth v. Farmers' Loan & Trust Co., 95 Fed. Rep. 5.

Equity has jurisdiction because there is no adequate remedy at law: Bispham's Equity, p. 528; Reeside v. Reeside, 49 Pa. 322.

The jurisdiction of equity (at least concurrent) is secured by sec. 19 of the Act of October 13, 1840: Adams's App., 113 Pa. 449; Shriver v. Nimick, 41 Pa. 80; Persch v. Quiggle, 57 Pa. 247; Reeside v. Reeside, 49 Pa. 322; Bredin v. Kingland, 4 Watts, 420; McFadden v. Sallada, 6 Pa. 283; Shollenberger's App., 21 Pa. 337.

I. Hazleton Mirkil and *Francis E. Brewster*, for appellee.—There is no jurisdiction in equity where the remedy at law is adequate: Koch's App., 93 Pa. 434; Young's App., 3 Penny. 463; Hewitt's App., 88 Pa. 55.

There is no jurisdiction in equity to recover damages for tort: Meres v. Chrisman, 7 B. Monroe (Ky.), 422; Brown v. Wabash Ry. Co., 96 Ill. 297.

In cases where jurisdiction at law and in equity is concurrent, if jurisdiction at law first attaches, suit in equity cannot be brought: 1 Pomeroy's Equity, sec. 179; Ins. Co. v. Bailey, 80 U. S. 616; Bank of Bellows Falls v. Rutland, etc., R. R., 28 Vt. 470.

Opinion by Mr. Justice Potter, July 9, 1903:

The Standard Coal and Timber Company of West Virginia, claiming to be the owner of a large tract of land in McDowell county, executed and delivered to the Commonwealth Title Insurance and Trust Company of Philadelphia, as trustee, a mortgage or deed of trust, dated May 2, 1892, upon 204,000 acres of mineral and timber lands located in said county and state. This mortgage was given to secure the payment of a series of 1,000 coupon bonds of the coal and timber company, for $1,000 each, amounting in the aggregate to $1,000,000, all bearing the same date, and payable in twenty years, with five per cent interest. There was a provision in the mortgage that "before issuing any of the bonds herein described, there shall be deposited by the party of the first part with the said trustee a sum of money sufficient to pay off the first four coupons (two years' interest) on said bonds. On or before the first days of May and November in each and every year, thereafter while this trust continues, the said company shall deposit with said trustee a sum of money sufficient to pay the interest then maturing on all outstanding bonds." The bonds provided

"this bond shall not become obligatory unless it shall have been certified by the signature of the trustee aforesaid indorsed hereon."

The trust company on June 6, 1892, duly acknowledged its acceptance of the trust, and a large part of the bonds were executed by the coal and timber company and placed in the custody of the trustee before April 29, 1892, but none were certified in accordance with the above provision with the exception of 252 of the bonds under the following circumstances: On February 21, 1893, the firm of Rice Brothers, lumber merchants, of Providence, R. I., entered into a contract with one Howland, for the purchase of timber to be cut from the lands described in the mortgage. Howland was in some way connected with the Standard Coal and Timber Company, and that company was interested in his contract with Rice Brothers, and guaranteed its performance.

For the purpose of procuring machinery and appliances for carrying on its business, the company was in need of the sum of $15,000. The assistant secretary of the company, one Cokefair, applied to the defendant trust company for a loan of that sum, but was refused. He then negotiated with Rice Brothers for the loan of their name and credit, by procuring their notes to be discounted for the benefit of the timber company, and the proceeds to be used in the erection of the needed plant. Before delivering this paper which was by way of accommodation only, the Rice Brothers insisted upon security, and were given an order upon the secretary of the trust company, signed by C. C. Cokefair, assistant secretary, and dated April 29, 1893, directing the trust company to hold in trust or deliver to the order of Rice Brothers, lumber dealers of Providence, R. I., one hundred first mortgage $1,000 bonds of the Standard Coal and Timber Company, in accordance with the terms of the mortgage or trust deed held by them to secure said bonds. Upon receipt of this order, the trust company on the same date by its treasurer, A. A. Stull, wrote the following letter:

"PHILADELPHIA, Pa., April 29, 1893.

"MESSRS. RICE BROTHERS,

"Providence, R. I.

"Gentlemen: We are in receipt of order from the Standard

Coal and Timber Company of West Virginia, instructing us to hold in trust for you one hundred first mortgage $1,000 bonds of said company, the same being part of an issue of 1,000 bonds, $1,000,000, all of which are equally secured by a first mortgage or deed of trust, dated May 2, 1892, made to the Commonwealth Title Insurance and Trust Company of Philadelphia, as trustee by the said Standard Coal and Timber Company of West Virginia, covering 204,000 acres of mineral and timber lands located in McDowell County, in said state of West Virginia.

"The company is incorporated under the laws of the state of West Virginia, and the bonds are secured by the first mortgage or deed of trust, now held by us as trustee. Said mortgage or deed of trust, together with certified abstract of title, opinions as to the value of property covered by said mortgage or deed of trust, maps, surveys and other papers relating to the same have been carefully examined and approved by us and are now in our possession.

"We will hold the one hundred (100) bonds subject to your order. "Respectfully yours,

"A. A. Stull, Treasurer."

Thereupon Rice Brothers, claiming to rely upon the assurance contained in this letter, loaned their accommodation promissory notes to the timber company, as had been requested by Cokefair, and as a result sustained a heavy loss.

On September 18, 1893, the trust company resigned its trusteeship, owing to the discovery that the title of the timber company to the mortgaged premises was not good and the securities were therefore of no value. Subsequently the alleged claim of Rice Brothers against the defendant trust company was assigned to Carroll Sprigg, the complainant. On December 31, 1898, Sprigg filed this bill in equity against the trust company setting forth the above facts and praying for:

1. A decree that the plaintiff was entitled to relief and that the trust company was equitably bound to act as trustee and to enforce the terms of the mortgage.

2. A decree that the trust company was bound to pay to the plaintiff the face value of the second, third and fourth coupons on one hundred bonds amounting to $7,500, with interest.

3. A decree ordering the trust company to pay the plaintiff the sum of $7,500, with interest.

Upon the trial of the case it appeared that the trust company, between August 20, 1892, and August 16, 1893, actually certified and issued to various persons 252 bonds of the timber company of the face value of $252,000. Before these bonds were issued, each of the bondholders deposited with the trustee a sum of money sufficient to pay the first four coupons upon the bonds to be issued to him, in all $25,200, and when the bonds were issued, this money was repaid to the bondholders in satisfaction of their coupons. None of the money so paid out by the trustee was received from the Standard Coal and Timber Company and no money was paid to any bondholder except that which he himself had first paid to the trustee.

When these facts were disclosed, complainant, by leave of the court, filed an amended bill, setting them forth, and prayed that the trust company should be required to account as trustee for all moneys deposited with it to pay coupons, and should be surcharged with the sum of $25,200, received for that purpose as above stated.

It appeared upon the trial that Rice Brothers had brought a suit at law in the circuit court of the United States for the eastern district of Pennsylvania, which had been marked to the use of Carroll Sprigg, against the defendant company, and that this suit was based upon the same facts as the bill in equity and was pending and undetermined.

The court below found that the complainant had an adequate remedy at law, and that his bill should therefore be dismissed. Exceptions to this finding were overruled and the bill, as amended, was dismissed. From this decree the complainant has appealed.

The dismissal of the bill is assigned for error.

The plaintiff contends that the defendant violated its duty in allowing any bonds to go out, without first requiring the deposit with it of money sufficient to pay off the first four coupons. But for any such failure the defendant, if liable at all, could respond in damages. This is true also with regard to any allegations as to title. If they were such as to give to the plaintiff any right of action, his redress would be at law, and not in equity.

The bonds in question were never actually issued by the defendant to the plaintiff, and no money was deposited by the mortgagor for the payment of interest upon these bonds, or upon any others. The transaction between the defendant and the holders of such bonds as were actually issued simply amounted to a waiver, or surrender by the parties taking the bonds of the first four coupons.

This end might have been attained by detaching the coupons, before delivering the bonds. But the result was precisely the same when the parties who took the bonds left on deposit a sum sufficient to pay the coupons, which the defendant had agreed should be paid.

This is not a case of mutual demands, nor of complicated accounts; nor is any discovery sought. So far as there is any account at all it is unilateral, and the balance is ascertained and undisputed.

"Where no decree is sought but one for the payment of money, which can be as easily recovered in an action at law, the case is not one of specific relief, and consequently does not fall within the equity head of granting relief where a recovery in damages would be an inadequate remedy:" Kauffman's Appeal, 55 Pa. 383, 386.

Where the accounts are all on one side and no discovery is sought, equity will not entertain jurisdiction: Passyunk Bldg. Assn's. Appeal, 83 Pa. 441. In this case, 1 Story's Eq. section 459, is cited, in which is stated as follows:

"It may be laid down as a general doctrine that in matters of account arising from privity of contract, courts of equity have a general jurisdiction where there are mutual accounts (and a fortiori where these accounts are complicated), and also where the accounts are on one side, but a discovery is sought, and is material to the relief. And on the other hand where the accounts are all on one side, and no discovery is sought or required, and also where there is a single matter on the side of the plaintiff seeking relief, and mere set-offs on the other side and no discovery is sought or required,—in all such cases courts of equity will decline taking jurisdiction of the causes."

Equity will not decree an account where the account is a mere matter of charge for a certain number of tons of ore, with no entries on the other side of the account; this is clearly

the subject of an action of assumspit at law: Grubb's Appeal, 90 Pa. 228.

For other late cases in which equity has refused to take jurisdiction upon the ground that there was an adequate remedy at law, see Keystone Electric Light, etc., Co. v. Peoples' Light, Heat & Power Co., 200 Pa. 366; O'Neil v. McKeesport, 201 Pa. 386; Baltimore Life Ins. Co. v. Gleisner, 202 Pa. 386; Stewart Wire Co. v. Lehigh Coal & Navigation Co., 203 Pa. 474.

We can see nothing in this case which calls for the aid of a court of equity, to ascertain or adjust the claim.

In addition, prior to filing his bill, the appellant brought suit at law in the circuit court of the United States. While the act of October 13, 1840, confers concurrent jurisdiction upon courts of equity in all cases where account render previously lay, the jurisdiction of the court which first takes actual cognizance of the controversy becomes exclusive in the absence of any peculiar equitable ground to the contrary: Pomeroy on Equity (2d ed.), sec. 179; Bank of Bellows Falls v. Rutland, etc., R. R. Co., 28 Vt. 470. No such peculiar equitable ground exists here.

The relation of trustee and cestui que trust no doubt exists between the trustee under a corporation mortgage and the bondholders. But the case of Frishmuth v. Farmers' Loan & Trust Co., 95 Fed. Repr. 5, relied on by appellant, while so holding, also decides that an individual bondholder has no standing to maintain a bill based upon that relationship. His suit must be brought on behalf of all the bondholders as well as himself.

In the present case the appellant's assignors never became bondholders. Their entire claim is based upon the letter of April 29, 1893. No bonds were ever issued to them, consequently the appellee never became their trustee in any sense whatever. They may be able to maintain an action of assumpsit upon the contract alleged to be embodied in that letter, or of trespass by reason of some breach of duty or deceit on the part of appellee. In the opinion of Judge DALLAS, quoted in appellee's paper-book, the view is expressed, in which appellant seems to have acquiesced, that if he had any remedy, it was by action of deceit. In any view of the case, the remedy of ap-

pellant was at law and not in equity and the court below committed no error in dismissing the bill.

The assignments of error are overruled and the decree is affirmed.

Plains Township's Appeal.

Appeals—Certiorari—Review—Municipalities—Act of March 31, 1864, *P. L.* 162.

On an appeal in the nature of a certiorari from an order of the court of quarter sessions made under the Act of March 31, 1864, P. L. 162, relating to the collection of district and township debts, nothing is brought up for review by the Superior Court except the regularity of the proceedings in the court below. If no irregularity is disclosed in the proceedings the appeal should be dismissed without considering any other question.

Municipalities—Indebtedness—Special tax levy—Judgment.

Judgments in the common pleas or on the docket of a justice of the peace against a township are, in the absence of jurisdictional defects conclusive, and cannot be attacked in a collateral proceeding in the court of quarter sessions to compel the levy of a special tax to pay the judgments.

Argued April 13, 1903. Appeal, No. 242, Jan. T., 1902, by Plains Township, from order of Superior Ct., Jan. T., 1903, No. 19, affirming decree of Q. S. Luzerne Co., April T., 1894, No. 341, ordering the levy of a special tax in the matter of the appeal of Plains Township. Before MITCHELL, DEAN, FELL, BROWN and MESTREZAT, JJ. Affirmed.

Appeal from Superior Court. See 21 Pa. Superior Ct. 68.

Error assigned was the judgment of the Superior Court.

Charles E. Terry and *Alexander Farnham*, with them *John M. Garman*, for appellant.

John McGahen, with him *E. A. Lynch*, *William S. McLean*, *George R. McLean* and *E. K. Little*, for appellees.

OPINION BY MR. JUSTICE BROWN, July 9, 1903:

The facts in this case sufficiently appear in the opinion of

the Superior Court affirming the order of the court below: Plains Township's Appeal, 21 Pa. Superior Ct. 68; and they need not, therefore, be repeated here. The order of the court of quarter sessions was made under the provisions of the Act of March 31, 1864, P. L. 162, from which no appeal lies: Lehigh Coal & Navigation Co.'s Appeal, 112 Pa. 360; and, on the certiorari, there was nothing brought up for review by the Superior Court, except the regularity of the proceedings in the court below. As no irregularity was disclosed in them, the appeal should have been dismissed without considering any other question.

If, in the proceeding before it, the court of quarter sessions had decided that the judgments against the township of Plains in the common pleas and on the dockets of the various justices of the peace were not conclusive of its indebtedness to the respective plaintiffs, there would have been the grossest irregularity on the face of the record. In the sessions these judgments from the common pleas and the courts not of record were, of course, conclusive. Even if the legislature could authorize the court of quarter sessions to declare a judgment of the common pleas invalid, and to decide that the indebtedness represented by it cannot be collected, no such jurisdiction has been conferred by the act of 1864. If the judgments of which the township is now complaining are invalid because they represent indebtedness contracted in violation of article 9, section 8, of the constitution, and the appellant has the right to resist their payment for that reason—which question we do not decide, because it is not now properly before us—the remedy is exclusively by proper proceedings instituted on the equity side of the common pleas.

The order of the Superior Court, affirming the order of the court below, is affirmed, and this appeal is dismissed at appellant's costs.

Marsh *v.* Lehigh Valley Railroad Company, Appellant.

Negligence—Railroads—Master and servant—Evidence—Explosion of locomotive.

While an employer owes his employee the duty of furnishing such machinery and appliances as, in the ordinary usage of the business engaged in, are safe and suitable and of keeping them in such condition, a verdict and judgment cannot be entered against him at the suit of an injured servant on a guess that he was negligent or on a mere theory of specific negligence without proof to sustain it. Specific negligence must be shown by competent testimony before the question of liability can go to a jury, who, in no case or controversy, are to be guessers, but, in all, sworn triers of facts, upon evidence submitted to them.

In an action to recover damages from a railroad company for the death of a locomotive fireman, it appeared that the death was caused by the explosion of the boiler of a locomotive upon which the deceased was working. After the explosion parts of the boiler were varnished to preserve them, and they were stored away by the railroad company. When the case was called for trial the defendant presented to the court an affidavit stating that the portions of the boiler preserved were in the same condition as they were in immediately after the explosion, and that to properly understand the case the jury should view the boiler. Two experts for the plaintiff who examined the parts of the boiler preserved, testified that the iron was in poor condition, thin and worn, unsafe, rotted, wasted away and corroded; that it had wasted away from its original thickness of three eighths of an inch to one eighth of an inch, and was not thicker than a knife blade. One of the experts stated that in his judgment the explosion was caused by the unsafe condition of the boiler. *Held*, that the evidence was sufficient to submit to the jury on the question of defendant's negligence.

Negligence—Railroads—Master and servant—Fellow servant—Fireman—Boiler inspector.

A boiler inspector of a railroad is not a fellow servant of a locomotive fireman.

Argued April 14, 1903. Appeal, No. 85, Jan. T., 1903, by defendant, from judgment of C. P. Luzerne Co., May T., 1901, No. 293, on verdict for plaintiff in case of Kate L. Marsh v. Lehigh Valley Railroad Company. Before MITCHELL, DEAN, FELL, BROWN and MESTREZAT, JJ. Affirmed.

Trespass to recover damages for the death of plaintiff's husband. Before LYNCH, J.

The circumstances of the accident and the condition of the boiler, the explosion of which caused the death are stated at length in the opinion of the Supreme Court.

The court refused binding instructions for defendant.

Verdict and judgment for plaintiff for $6,750. Defendant appealed.

Error assigned among others was in refusing binding instructions.

James L. Morris and *Stanley Woodward*, of *Woodward, Darling & Woodward*, for appellant.—The direct cause of the accident, the specific negligence of the defendant that is alleged to have caused it, is not shown.

It is not permissible to guess at the cause of an injury, and to assume it is something for which the defendant was responsible: Reese v. Clark, 146 Pa. 465; Mixter v. Imperial Coal Co., 152 Pa. 395; Reese v. Hershey, 163 Pa. 253; Wojciechowski v. Spreckels's Sugar Refining Co., 177 Pa. 57; Dickerson v. Cent. R. R. of New Jersey, 189 Pa. 567; Zahniser v. Penna. Torpedo Co., 190 Pa. 350; Alexander v. Penna. Water Co., 201 Pa. 252; Higgins v. Fanning & Co., 195 Pa. 599; Price v. Lehigh Valley R. R. Co., 202 Pa. 176.

The negligence complained of was that of a fellow servant, a risk of decedent's employment: P. & R. R. R. Co. v. Hughes, 119 Pa. 301; Durst v. Carnegie Steel Co., 173 Pa. 162; Spees v. Boggs, 198 Pa. 112; McAvoy v. Penna. Woolen Co., 140 Pa. 1; Lehigh Valley Coal Co. v. Jones, 86 Pa. 432; Keystone Bridge Co. v. Newberry, 96 Pa. 246; Reading Iron Works v. Devine, 109 Pa. 246; N. Y., etc., R. R. Co. v. Bell, 112 Pa. 400.

W. H. Hines, with him *D. C. Harrower*, for appellee.—The evidence was sufficient to submit to the jury: Fuller v. Jewett, 80 N. Y. 46; Dyer v. Pittsburg Bridge Co., 198 Pa. 182.

A boiler inspector is not a fellow servant of a fireman: Hough v. Ry. Co., 100 U. S. 213; Lawless v. Conn. River R. R. Co., 136 Mass. 1; Forsyth v. Hooper, 93 Mass. 419; Fuller v. Jewett, 80 N. Y. 46; Ford v. Fitchburg R. R. Co., 110 Mass. 240; Northern Pacific R. R. Co. v. Herbert, 116 U. S. 642 (6 Sup. Ct. Repr. 590); Penna. & N. Y. Canal & R. R. Co. v. Mason, 109 Pa. 296.

Opinion by Mr. Justice Brown, July 9, 1903:

The first reason urged why this judgment should be reversed is, that "the direct cause of the accident, the specific negligence of the defendant that is alleged to have caused it," was not shown on the trial below. In pressing this reason, the learned counsel for the appellant insist that the case of plaintiff, as presented, is simply one of a supposed theory as to the cause of the accident, and is not supported by established facts.

It is, of course, true that, as between employer and employee, the mere happening of an accident raises no presumption that it was due to the negligence of the employer, and no theory as to how it might have happened, not supported by facts from which the jury can fairly find that the specific act of negligence charged is sustained, will justify the submission of the question to them. While the employer owes his employee the duty of furnishing such machinery and appliances as, in the ordinary usage of the business engaged in, are safe and suitable, and of keeping them in such condition, a verdict and judgment cannot be entered against him at the suit of an injured servant on a guess that he was negligent, or on a mere theory of specific negligence, without proof to sustain it. Specific negligence must be shown by competent testimony before the question of liability can go to a jury, who, in no case or controversy, are to be guessers, but, in all, sworn triers of facts, upon evidence submitted to them. This we have repeatedly said in cases like the present, among the latest being Higgins v. Fanning & Co., 195 Pa. 599; Spees v. Boggs, 198 Pa. 112; Alexander v. Penna. Water Co., 201 Pa. 252; Price v. Lehigh Valley R. R. Co., 202 Pa. 176; and the judgment here cannot be sustained if it is on a finding of a mere theory, unsupported by proof that the railroad company was negligent.

The specific act of negligence charged against the appellant is, that it knowingly supplied a locomotive with an old, worn, defective, unsafe and dangerous boiler, which exploded and caused the death of appellee's husband. On the day of the trial—February 19, 1903—two expert witnesses, called by the plaintiff, had examined the exploded portions. Complaint now seems to be made by the appellant of the examination

of the pieces of the boiler by these witnesses, because it was not made until nearly two years after the explosion; but the fact is overlooked that, on February 16, 1903, an order was made for a view of the exploded parts by the jury on application of the defendant, based on an affidavit of counsel that "the exploded portions of the boiler of said engine are now in the same condition in which they were when found immediately after the explosion, and that for a proper understanding of the testimony and trial of the case, the jury should view and examine the exploded portions of said boiler." In addition to this, on the trial, E. T. James, a witness called by the defendant, testified that the parts had been cut as carefully as possible and that both sheets and crown from the boiler had been varnished and put away, that they might be kept as nearly as possible in the condition in which they were found. As a result of their inspection of the pieces of the exploded boiler, these two witnesses called by the plaintiff testified that the iron was of poor condition, thin and worn, unsafe, rotted, wasted away and corroded; that it had wasted away from its original thickness of three eighths of an inch to one eighth of an inch, and was not thicker than a knife blade; and one of them stated that, in his judgment, the explosion was caused by this unsafe condition of the boiler. In the testimony of John Hart, the following is found: "Q. Tell the jury what you saw there when you made this examination. A. Well, I found the boiler in some places to be hard and crystallized metal and in other places very thin; towards the front sheet, that would be the tube sheet end, there, very thin on both sides; and from there up to about four feet, I think, one side—about four feet—very thin, runs down to a thickness of a knife blade on the edge; been corroded and wasted around the rivets through the mud ring, making it very weak there on both sides. Q. What else did you see? A. Well, I see that some of the metal seemed to very good. It stands two or three times—and don't make no fracture; while the others look to me as though it would not stand anything, unfit to have on the road. . . . Q. Did you make a very careful examination of this boiler? A. I went over it twice. I did not overlook that I know of. I looked it over carefully and done the best I could do with it. . . . Q. Looking at these photo-

graphs, and the evidence being that the explosion caused this boiler to be lifted up and thrown over a track into the river and the engineer and the firemen and brakemen lifted up and flung a distance of several cars from the engine—taking that in connection with your examination of this boiler, what, in your judgment—in your judgment, now—was the cause of that accident? A. I answered that question before. I thought the boiler was not safe ; ruptured right around—and in that manner. Q. When you said the boiler was not safe, where, if anywhere, was the weakness shown in that boiler? A. Shown right from the mud ring up. Q. How were the bolts? A. The bolts looked as if they had been pulled out of some of the holes for a distance up and I could not tell anything about the rest; because they had been chipped off—could not say anything about the rupture from there up. Been chipped off—diamond pointed. Q. How were these back heads held together? A. Held together in the boiler leg with stay bolts—outer to the inner sheet. Q. Stay bolts? A. Yes, sir. Q. In speaking of this rupture where you say those stay bolts were cut off and this rupture, you say the upper portion of it being stronger than down at the lower portion where you say it was as thin as a knife blade and split all the way up? A. Yes . . . . Q. (The Court): What is the usual thickness of boiler iron in locomotive boilers of this character? A. Well, they make them from three eighths up. I notice that this metal is three-eighths inches boiler now, the crown sheet ; the tube sheet is half-inch metal, that is the back head is half-inch metal. Q. (Plaintiff's counsel): How thick is it at this point where the tear commences? A. Where it starts, just about as thick as a knife blade on every edge." On cross-examination, the witness testified: "Q. You say the explosion of this boiler was caused by its being in an unsafe condition? A. Yes, sir. Q. You do not say what that unsafe condition was due to, do you? A. Sir? Q. You do not say to what that unsafe condition was due at the time of the explosion ? A. Very weak and was not able to withstand the pressure necessary to do your work, I presume. Q. But you do not say why it was weak? A. I think it has been wasted away. Q. Did you examine the crown sheet for signs of low water? A. Yes, sir . . . . Q. You say the boiler was unsafe ? A. In my opinion,

Q. Because it did explode? A. Yes, did explode. My opinion, I say it was unsafe, rotted, wasted away, corroded away there." Lyman H. Carle testified: "Q. Tell what you saw when you examined that boiler—its condition. A. There was only a portion of the boiler there. The front or cylinder part of the boiler was not there. The fire box and crown sheet and wagon top and mud-ring, all those were there. The rest were not there as I saw. The boiler on the top part looked to be good; the iron looked to be good and its usual thickness. On the bottom it was in very bad condition, very thin, as though it had been worn away with sediment, bad water, and so on, from usage. . . . (The Court): Describe what you saw there. A. The iron, as I saw it, in my opinion from the top—on the top of the iron is good, evidently it was, because in one place it is bent over like this and no fracture in it at all. Then as you go down from that to the mud-ring it gets worse. Down close to the mud-ring there is places where it was not, I should judge, one eighth thick, not thicker than a knife blade, that is a good sized pocket knife blade. As you went down, the thinner it was and the worse condition. While I did not sound it with a hammer, anything of that kind as to whether it was crystallized or not, there was portions I thought was crystallized and part not. The iron top was excellent good condition. The iron on the bottom very bad condition. . . . Q. Did you examine what is called the mud-ring? A. Yes, sir. Q. What was the condition of that as you saw? A. Poorly, bad condition. Q. Describe. A. The iron was thin, worn. Q. Thin and worn? A. Yes, sir. . . . Q. Did you examine the stay-bolts? A. I did. Some of them were stripped and some of them were in their place broken. Some of them were stripped, the threads stripped off, stripped through the sheet, the threads stripped off, others broken right off at the sheet. Q. When the thread is stripped off, what does that indicate? A. Poor iron poorly put in. Q. Did you say some were broken? A. Some were broken."

The testimony of these two witnesses is not merely as to a theory of what might have caused the explosion, but is a recital of facts, which, if believed by the jury, sustain the plaintiff's allegation that the defendant was negligent in placing its

fireman on a locomotive supplied with an old, worn, defective, unsafe and dangerous boiler. Further discussion cannot make it plainer that there was testimony which the court was bound to submit to the jury in support of the specific negligence charged against the defendant; and, though the jury might very fairly have found, from the testimony offered by the defendant, that its theory of the cause of the explosion was the correct one, the question was exclusively for their determination, and their finding as to it cannot be disturbed. Whether the appellant had discharged its full duty to the deceased by furnishing reasonably safe and suitable appliances for the work to be done, and, by having the boiler regularly and carefully inspected, and having made all proper repairs thereto, was a question for the jury. If the inspections were carelessly made by the inspector, the court properly held that the latter's carelessness was not that of a coemployee of the deceased: Penna. & New York Canal & R. R. Co. v. Mason, 109 Pa. 296. Finding no error in this record, which is that of a trial involving pure questions of fact, the judgment is affirmed.

Briggs, Appellant, *v.* East Broad Top Railroad & Coal Company.

Negligence—Railroads—Broken rail—Rotten ties—Evidence.

In an action against a railroad company to recover damages for the death of one of its conductors, caused by a broken rail, the court commits no error in refusing to submit the case to the jury, where the plaintiff's theory that the break was caused by a rotten tie, is not supported by any definite testimony that the ties were rotten at the place of the break.

In such a case it is not error for the court to refuse to permit the plaintiff to show that the defendant company had allowed its roadbed and its rails to fall into bad repair generally, and at places other than that of the accident. O'Donnell v. Allegheny Valley R. R. Co., 59 Pa. 239, distinguished.

Evidence—Res gesta—Declarations—Negligence—Railroads.

In an action against a railroad company to recover damages for the death of one of its conductors caused by a broken rail, it is not error for the court to exclude proof offered by the plaintiff of declarations made about half an hour after the accident by the division foreman.

Argued April 20, 1903. Appeal, No. 269, Jan. T., 1902, by plaintiff from judgment of C. P. Huntingdon Co., Feb. Term, 1901, No. 1, on verdict for defendant in case of Sarah E. Briggs v. East Broad Top Railroad and Coal Company. Before DEAN, FELL, BROWN, MESTREZAT and POTTER, JJ. Affirmed.

Trespass to recover damages for death of plaintiff's husband. Before BAILEY, P. J.

At the trial it appeared that on March 5, 1900, plaintiff's husband, George W. Briggs, a conductor employed by defendant, was killed by the derailment of a passenger train. The accident was caused by the breaking of a rail. Plaintiff claimed that the break was due to rotten ties. The evidence on this subject is summarized in the opinion of the Supreme Court.

Plaintiff made the following offer:

We propose to prove by the witness on the stand and other witnesses that the roadbed of the East Broad Top Railroad Company, almost its entire length from Orbisonia to Woodvale, was in bad condition, and had been allowed to get into bad condition; that the ties along the road at the vicinity of this accident and along its line in other places near this accident, and farther away, were rotten; that the rails in places were so insecurely fastened upon the track that a man could go along and pull a spike fastening the rail to the tie with his fingers; for the purpose of proving the defendant company had allowed their roadbed and all their rails to fall into bad repair; for the purpose of proving negligence of this company.

Judge Furst: Defendant's counsel object to the offer in so far as the offer proposes to prove the condition of the road at any other point than the point where the accident occurred, the evidence and proof already offered showing that the accident occurred by means of the breaking of a rail, therefore any defects that might have existed on other parts of the road could not have contributed to this injury; no objection is made to proof showing the defective condition of the road at the time of this accident, or immediately prior thereto at the point where the injury occurred; the residue of the offer is objected to as irrelevant and immaterial to this issue.

The Court: Objection sustained. Testimony excluded. Bill of exceptions sealed for plaintiff. [3]

Mr. J. S. Woods: We offer to prove by the witness on the stand and other witnesses that the morning of the accident, while the body of Mr. Briggs was still there at the place of the accident, that Mr. Harry Taylor, the division foreman, said to the witness, "You men must not blame me for this thing; it is not my fault; they would not give me any stuff to fix the road;" he said he had asked for rails and didn't get them; this was within a short time after the wreck, possibly half an hour; he told us this when he was bringing a new rail; I told him he might as well have put in a wooden rail; the purpose is as part of the res gestæ; and Mr. Taylor was the man who had charge of the road; this occurred about half an hour after the accident with Briggs still there and the wreck still there.

Judge Furst: It is objected that the declarations of Mr. Taylor made after the accident are not part of the res gestæ, and are not admissible as evidence against this defendant.

That his declarations are not evidence because he was not in charge of this train; he had nothing to do with the running of the train; that Harry Taylor is simply a track foreman, and his declarations are not sufficient in law to bind this defendant.

The Court: Objection sustained. Testimony excluded. Bill of exceptions sealed for plaintiff. [12]

The court gave binding instructions for defendant.

Verdict and judgment for defendant. Plaintiff appealed.

Errors assigned among others were (1) binding instructions for defendant; (3, 12) rulings on evidence, quoting the bill of exceptions.

James S. Woods and *W. H. Woods*, for appellant.—It was for the jury to determine whether or not the rottenness of the ties under the rail caused it to crack and break, or contributed to the accident in any way: O'Donnell v. Allegheny Valley R. R. Co., 59 Pa. 239; Penna. R. R. Co. v. Zink, 126 Pa. 288; McCombs v. Ry. Co., 130 Pa. 182.

A principal is bound by the declarations of his agent made at the time and place of accident, in the course of his employment, or within a reasonable time thereafter: Dodge v. Bache, 57 Pa. 421; Union R. R., etc., Co. v. Riegel & Co., 73 Pa. 72.

J. D. Dorris and *A. O. Furst*, for appellee.—The master is

not liable for latent defects: Simpson v. Pittsburg Locomotive Works, 139 Pa. 245; McAvoy v. Pennsylvania Woolen Co., 140 Pa. 1; P. & R. R. R. Co. v. Hughes, 119 Pa. 301; Mensch v. Penna. R. R. Co., 150 Pa. 598; Elmi v. National Tube Works Co., 203 Pa. 186.

The alleged narrative was of a past occurrence and was not part of the res gestæ, nor could the declarations of a track foreman under such conditions bind the defendant company: Penna. R. R. Co. v. Books, 57 Pa. 339; Ogden v. Penna. R. R. Co., 23 W. N. C. 191.

Opinion by Mr. Justice Potter, July 9, 1903:

The plaintiff in this case is the wife of George W. Briggs, who was killed while engaged as a conductor on the line of the East Broad Top Railroad & Coal Company, on March 6, 1900. This company operated a narrow gauge railroad extending from Mt. Union, Huntingdon county, to Woodvale, in the same county, a distance of about thirty-six miles.

At the time of the accident, the deceased was in charge of train No. 6, going south from Orbisonia at a place called Martins Meadow. The train was a mixed one of freight and passenger cars. It was admitted that the accident was caused by the breaking of a rail. Plaintiff claimed that the proximate cause of the breaking of the rail was rotten ties. The railroad company defended on the ground that the breaking of the rail was caused entirely by a latent defect in the structure of the rail called a "pipe."

At the trial, plaintiff offered evidence showing that the breaking of a rail caused the car on which her husband was riding to upset. She also called witnesses to show that at that point the ties, or some of them, were rotten. But none of these witnesses fixed definitely the location of the rotten ties. There was, however, some evidence that some of the ties under the rail were rotten, and were mashed by the car wheels after the train left the track.

The witness, Cox, was perhaps more exact than any other witness in attempting to locate the defective ties. He visited the scene of the accident the next day, and after a new rail had been laid to take the place of the broken one. While in answer to the question, "With respect to the broken place in

the rail, did you see any new tie there?" he testified, "I saw one new," he modified his answer by saying he thought it was at the exact place, but was not positive, and further qualified it by testifying that he saw no loose tie that had been taken out, nor did he see any digging, as if a tie had been removed.

Evidence was also introduced to show that two men had seen a large rusty crack in the rail at the place of the break the day before the accident, but there was no evidence that the defendant company had notice of the condition of the rail.

We do not regard this evidence as sufficient to justify a submission of the case to the jury. There was no definite testimony that the ties were rotten at the place of the break. A conclusion that they were would be nothing more than a guess.

When the evidence of the defendant upon this point is considered, the conclusion is irresistible that the break in the rail was not due to rotten ties. It tended to show that the break in the rail occurred between two ties: that the condition of the ties was good; that the alignment of the track was all right, and that the rails had not spread; that on the Saturday previous the track had been inspected; two experts testified that there was a latent defect at the place in the rail called a "pipe," which could not have been discovered by any inspection; it was shown that a much heavier train had passed safely over the spot where the accident occurred about half an hour before the accident.

We do not consider that there is any real conflict in the evidence; that on the part of the plaintiff in this respect being a mere guess as to the condition of the ties at the precise place of the accident, while the testimony on the part of the defendant is clear and positive.

Plaintiffs offered to prove that the defendant company had allowed its roadbed and its rails to fall into bad repair generally, and at places other than that of the accident.

Defendant's counsel objected, in so far as the offer proposed to prove the condition of the road at another point than that where the accident occurred. This objection was sustained and rightfully, we think. The general condition of the road was not involved in the issue to be tried. The question was whether the train had been thrown from the track by reason of the negligence of the company or its agents or servants, at that point.

Evidence of negligence at some other point, which did not contribute to this accident, was clearly incompetent. This principle has been clearly declared and sustained in other states. See R. R. Co. v. Fox, 11 Bush (Ky.), 495; Huntley v. R. R. Co., 38 Mich. 537. There the injury was caused by a passenger car being thrown from the track. The court says: "We are also of opinion that no defects in the track could be relied on to show negligence contributing to the accident except those existing where the track was injured or displaced, and that testimony as to the condition of the road away from the scene of the injury was improper, to make out a cause of action, and could only tend to raise false issues." To the same effect is Morse v. R. R. Co., 30 Minn. 465.*

We do not regard O'Donnell v. Allegheny Valley R. R. Co., 59 Pa. 239, as being in conflict with the doctrine of these decisions. In that case there was testimony that the injury arose from the breaking of a rail which was caused by its resting upon rotten ties. It was further shown that the ties were of hemlock and had been allowed to remain in place for twelve or thirteen years. This was regarded as clear evidence of negligence on the part of the company.

The plaintiff also complains here of the exclusion of proof of declarations made about half an hour after the accident by Harry Taylor, the division foreman. This evidence was properly excluded. It is clear that such declarations were not a part of the res gestæ. When they were made, the time which had elapsed since the accident was sufficient to convert them into a mere narrative of a past occurrence. We think the trial court was justified in assuming the responsibility in this case, of directing a verdict for the defendant.

The assignments of error are all overruled, and the judgment is affirmed.

---

* Also reported, 16 N. W. Repr. 358. Reporter.

Burton *v.* Erie County, Appellant.

Prisons—Sheriff—Board of prisoners—Counties—Erie county—Municipalities.

The sheriff of Erie county is bound to receive and board prisoners committed to the county jail by the mayor and alderman of the city of Erie for violation of city ordinances, and the county is bound to pay the sheriff for the board of the prisoners so committed.

The mayor and alderman of a city have power to commit to the county jail persons guilty of violating city ordinances.

Argued April 27, 1903. Appeal, No. 86, Jan. T., 1903, by defendant, from judgment of C. P. Erie Co., Feb. T., 1903, No. 37, on verdict for plaintiff in case of S. S. Burton, Sheriff, v. Erie County. Before MITCHELL, DEAN, FELL, MESTREZAT and POTTER, JJ. Affirmed.

Issue to determine liability for board of prisoners. Before WALLING, P. J.

The opinion of the Supreme Court states the case.

The trial court gave binding instructions for plaintiff.

Verdict and judgment for plaintiff for $1,593.38. Defendant appealed.

A. E. Sisson, with him *George E. Gibson*, for appellant.

E. L. Whittelsey, for appellee, was not heard.

OPINION BY MR. JUSTICE DEAN, July 9, 1903:

The plaintiff claimed from the county of Erie $1,593.38 for boarding prisoners in the county jail; the county auditors passed and allowed his claim resulting in this balance at their settlement of the sheriff's accounts for the year 1901. There is no dispute as to the amount of the claim. The county, however, denied that it was answerable to the officer for the bill; on filing of the audit it appealed to the court of common pleas where an issue was framed between the parties to determine whether the county was answerable.

At the trial of the issue the county denied that it was in

law bound to pay the sheriff for the board of prisoners committed to jail by the mayor and alderman of the city of Erie in default of payment of fines for violation of city ordinances. The court below was of opinion that the county was legally bound to pay and instructed the jury to render a verdict for the balance claimed as heretofore noted. It is proper to say here, that the entire balance is made up of fines and commitment fees for violation of city ordinances. After judgment on the verdict the county brings this appeal to this court under the act of 1901.

The only question involved at the trial in the court below was: "Is the county of Erie liable for the boarding of prisoners committed by the mayor and aldermen of the city of Erie for the nonpayment of fines imposed for the violation of city ordinances?"

And that is the only question here; for while there are six assignments of error, they are all disposed of by the answer to that one question.

The duty of the sheriff to keep the jail and board the prisoners committed thereto has been fixed by statute since before the Revolution, as well as compensation therefor, which last was to be paid by the county. The act of February 24, 1770, enacts, "that all persons committed for any criminal offense whatsoever shall during their imprisonment have and receive three pence per diem each," and it further directed, that the commissioners for each county should pay the same to the sheriff, for the diet and support of such criminals out of the county funds. While several acts have since been passed for fixing the per diem allowance of the sheriff for each prisoner in jail, and special acts for the appointment in some counties of jailers or wardens of the jail to have direct personal supervision of the prisoners when in the jail, the official responsibility of the sheriff for the board and safe-keeping of the prisoners has not been interfered with. The sheriff then, in Erie county, was bound to receive on proper commitment all prisoners delivered to him; he was then bound by law to safely keep and board them until they were lawfully discharged either by expiration of term or by order of the proper court. Who shall pay, not for prisoners committed for any particular offense, or crime, but for prisoners kept in prison and boarded by the

sheriff? His conduct is not voluntary; he is bound to receive and board them; while the act uses the words, "committed for any criminal offense whatsoever," it is manifest these words were used to designate prisoners committed for any offense punishable by fine and imprisonment to distinguish them from persons imprisoned on capias for debt; which class, up to the act of 1842, abolishing imprisonment for debt, probably numbered as many as the other; for these a different provision was made. If the commitment be in form and made out by a properly authorized officer whether a judge of a court of record, coroner, mayor, alderman or justice of the peace, the sheriff must obey it; he is not clothed with the functions of a court of errors and appeals; he cannot sit at the jail door and determine as on a certiorari, that the proceedings were irregular, or as on an appeal, that the commitment was unjust to the prisoner; his single duty is to receive and safely keep.

It may be assumed that, if no provision for payment of the boarding of prisoners had been made, the sheriff would have been bound to board them at his own expense; the presumption would be, that he accepted his office cum onere; but the statutes from that of 1790 down to that of 1856 and the special act of 1866, this last relating to Erie and five other counties, do make provision for the boarding of prisoners and that the court of quarter sessions shall fix the rate. No distinction is made as to the locality or nature of the offense; those in custody are simply termed "prisoners." Nowhere in the statutes can we find any authority in the county auditors or in the courts to make any distinction between prisoners committed for a violation of the general laws of the commonwealth and those committed for violations of borough or city ordinances. In fact there is no distinction in substance; the one, although operative within certain municipal territorial limits is as much against the "peace and dignity" of the commonwealth, as any offense committed outside those limits. A borough or city has a concentrated and dense population whose health, comfort and safety demand special laws operative within municipal boundaries. Trespasses on each other's rights, and acts detrimental to the rights of all are more easily committed there than in sparsely settled regions; therefore, the commonwealth delegated to these subordinate divisions of her territory the power to make

laws for their government not inconsistent with the constitution and laws of the commonwealth. Although the authority is a delegated one it is just as high as the constitution or general assembly, for in them it has its source. When this authority is exercised within the limits of the constitution and laws it is promotive not only of the well being of the municipality but of the interests of all the people of the commonwealth. No one would think that a township supervisor, although his jurisdiction extends only to the boundaries of his township, could neglect his duty without injury to the general public. So all the people of the state to a greater or less degree are interested in the good government of the city of Erie by ordinances which promote travel on its streets, peace in its public assemblies, and health within its borders. There are no subdivisions of the state in which the entire people of the state have not an interest. And so we think violaters of the municipal laws of the city are as much the prisoners of the commonwealth and county as those who commit offenses outside of it.

Had the mayor and aldermen of the city power to commit to the county jail persons guilty of violating city ordinances? We think the act of May 23, 1889, confers this power. The act authorizes the enactment of ordinances, the imposition of fines and penalties for their violation and commitment to the county jail. It is suggested by counsel for appellant, that the legislature was without authority to thus appropriate the county jail to the use of a city. The county being only a subdivision of the commonwealth created for convenience in government, the legislature had full authority over the public property within it, unless that authority is restricted or withheld by the constitution. There is no constitutional inhibition that we are aware of, therefore, there was no legislative transgression of authority in directing commitment to the county jail. The scope of legislative power over counties is so fully discussed in Phila. v. Fox, 64 Pa. 169, by Justice SHARSWOOD that any repetition here is unnecessary.

As to the suggestion that the use of the county jail by the city ought to be the subject of contract between the county and city, we do not care to discuss that question because it has no bearing on this issue. The legislature had the power to direct the use of the jail by the city and exercised that power;

we cannot determine whether in so doing it acted wisely. Perhaps such an appeal to the legislature would be favorably considered.

We decide, only, that the sheriff was bound to receive and board prisoners committed to the jail by the mayor and aldermen of the city of Erie for violation of city ordinances, and that the county is bound to pay the sheriff for the board of the prisoners so committed.

All the assignments of error are overruled and the judgment is affirmed.

Palmer, Appellant, *v.* Warren Street Railway Company.

Negligence—Street railways—Passenger—Presumption—Collision.

The case of a passenger injured by a collision between two street cars of the same company is within the unbending rule applicable to railroad and passenger railway companies alike, that where a passenger on a car is injured without fault of his own, there is a legal presumption of negligence, casting upon the carrier the onus of rebutting it; and it is immaterial that the collision was not due to any defect in the car on which the plaintiff was riding or the machinery connected with it, but to a broken appliance on the car that ran into it.

Negligence—Street railways—Passenger—Presumption—Jumping from car.

A well grounded fear that a collision is about to take place which will result in fatal or even serious injury to a passenger, is a justification to him to leap from the car, and the presumption of the common carrier's negligence is not confined to the case of injuries resulting from actual collision, but extends to those caused by an effort to escape it, when made on a well grounded belief that it will occur.

Negligence—Street railways—Measure of care—Carriers—Passengers.

The utmost care and vigilance are required on the part of the carrier. This rule does not require the utmost degree of care which the human mind is capable of imagining, but it does require that the highest degree of practical care and diligence should be adopted that is consistent with the mode of transportation adopted. Railway passenger carriers are bound to use all reasonable precautions against injury of passengers; and these precautions are to be measured by those in known use in the same business which have been proved by experience to be the most efficacious.

It is not negligence on the part of a street railway company to run two cars towards each other on the same track.

Negligence—Evidence—Damages—Permanent injury—Ability.

In an accident case, where a physician has testified to the permanent character of an injury, he may be properly asked whether the injury will affect the plaintiff's ability to perform labor.

Argued May 4, 1903. Appeal, No. 354, Jan. T., 1902, by plaintiff, from judgment of C. P. Warren Co., Dec. T., 1900, No. 13, on verdict for defendant in case of Samuel S. Palmer and Kate Palmer v. Warren Street Railway Company. Before DEAN, FELL, BROWN, MESTREZAT and POTTER, JJ. Reversed.

Trespass to recover damages for personal injuries. Before LINDSEY, P. J.

At the trial it appeared that plaintiff, Mrs. Kate Palmer, was injured on July 26, 1900, by a collision between two cars of defendant. Mrs. Palmer was a passenger at the time. The accident was caused by a parting of the brake chain on the car which collided with the one on which Mrs. Palmer was riding. The circumstances of the accident are described in the opinion of the Supreme Court.

When Dr. Stewart was on the stand he was asked this question:

"Q. What would you say as to the permanency of that injury? A. Yes, sir. Q. Of the curvature of the spine? A. I should think it would be permanent. Q. How, if at all, would that affect her ability to perform labor?"

Objected to as incompetent and irrelevant.

Objection sustained and exception sealed for plaintiff. [7]

Plaintiff presented the following point:

If the jury find from the evidence that the plaintiff, Kate Palmer, was a passenger on the car of the defendant corporation, and that when said car was ascending quite a heavy grade, another car was suddenly discovered coming down the grade on the same track and toward the car on which the said plaintiff was a passenger, and that the electric current of the car upon which plaintiff was riding was reversed and said car was started back down the grade, and the other car kept gaining upon it, and a collision seemed certain, and the plaintiff, Kate Palmer, believed herself in imminent danger of being killed or seriously injured and was in the act of jumping from said

car to the ground and either actually jumped or when in the act of jumping was thrown from said car to the ground and was injured, and that immediately after she struck the ground said cars did actually collide, the presumption of law is that the defendant was negligent. *Answer:* We cannot answer this point in the affirmative as it is drawn. [1]

Defendant presented these points:

3. The burden of proof in this case is upon the plaintiffs to establish the negligence of the defendant. *Answer:* This is affirmed. [2]

5. If the jury believe that the defendant in this case adopted all reasonable precaution against the injuries of its passengers and that its cars and appliance were proper for its business in known general use, and that the reason for not immediately stopping the car approaching the one on which the plaintiff, Mrs. Palmer, was riding, was on account of unforeseen and unaccountable breaking of the brake chain, the plaintiff cannot recover. *Answer:* This is affirmed. If there was no other negligence on the part of the defendant, and when the motorman who was running the car that was approaching the car on which the plaintiff was riding, saw that car and he applied the brakes and the car slackened as he stated, that the brake chain broke and the car ran on and came in contact in the manner in which it was said; if it was in consequence of the breaking of the chain and the company had used the appliances and the cars such as are in common use, then they would not be liable. If it was in consequence of the breaking of the chain then you are to take into consideration in this respect, the evidence as to the care with which the cars were inspected in determining that question. [3]

The court charged in part as follows:

[Now, gentlemen of the jury, the first question which we submit to you is this: From all the evidence on the part of the plaintiffs and on the part of the defendant, was the defendant guilty of any negligence in the matter? If the defendant was not guilty of negligence then there can be no recovery. Where an accident happens and an injury takes place by collision and a passenger is injured in the collision, there is a presumption of negligence, and had Mrs. Palmer remained on

the car and had been injured in the collision which occurred, there would have been a presumption of negligence on the part of the company, which the company could rebut by testimony. But in this case, we say to you, it is incumbent upon the plaintiffs to show negligence and convince you of negligence.] [4]

[We say to you that we do not think the fact that there was a car coming from Irwindale park and another one going, and on the same track that that of itself would constitute negligence. It is different in relation to the conduct of a street car, we think, from that of the steam cars, which run at a much greater rate of speed, and the fact that these two cars were going toward each other on the same track, of itself would not be negligence. It might have been the intention of the motorman to transfer passengers, that might occur and sometimes is the case.] [5]

[Now, gentlemen of the jury, she would not be justified in jumping from the car unless there was danger—unless she was suddenly put in imminent danger of being injured in some way, and exercised her best judgment as to what she should do; where if she was put in a sudden peril as to life or limb. If she had a well founded belief growing out of the circumstances and facts that she was in imminent danger, then she would be justified in jumping and would not be guilty of contributory negligence. . . . Weigh this matter carefully and determine from the evidence on the part of the plaintiffs and the evidence on the part of the defendant whether or not the plaintiff was in such imminent peril as to justify her in jumping. If she was then she would not be guilty of contributory negligence.] [6]

Verdict and judgment for defendant. Plaintiff appealed.

Errors assigned were (1–6) above instructions, quoting them; (7) rulings on evidence, quoting the bill of exceptions.

George H. Higgins, with him *Allen & Son*, for appellant.—Where an injury occurs to a passenger in consequence of something done or not done, connected with appliances of transportation, there arises a presumption of negligence which the carrier is required to rebut: Kepner v. Harrisburg Traction Company, 183 Pa. 24; Fleming v. Pittsburg, etc., Railway Co.,

158 Pa. 130; Dixey v. Phila. Traction Co., 180 Pa. 401; Clow v. Pittsburg Traction Co., 158 Pa. 410; Philadelphia & Reading Railroad Co. v. Anderson, 94 Pa. 351; Willis v. Second Avenue Traction Co., 189 Pa. 430.

If a person should leap from a car in which he is a passenger under the influence of a well grounded fear that a fatal collision is about to take place, his claim against the company for the injury he may suffer will be as good as if the same mischief had been done by the apprehended collision itself: Penna. R. R. Co. v. Aspell, 23 Pa. 147; Willis v. Second Ave. Traction Co., 189 Pa. 430.

W. E. Rice, with him *W. D. Hinckley*, for appellee.—The language of the decided cases is, that in order to recover for injuries sustained in jumping from a car, it must be "under the influence of a well grounded fear, that a fatal collision is about to take place:" Penna. R. R. Co. v. Aspell, 23 Pa. 147; Willis v. Second Avenue Traction Co., 189 Pa. 430.

Opinion by Mr. Justice Brown, July 9, 1903:

Mrs. Kate Palmer was a passenger on an electric car of the defendant company. As it approached an up grade a car with a trailer attached was seen descending and coming towards it on the same track. The brake chain on the descending car had broken, and the motorman was unable to control it. The motorman of the car on which the plaintiff was riding, seeing that a collision was inevitable, stopped his car, and, having reversed the current, started it backwards. The other cars were gaining on it, until it seemed that the collision could not be avoided, and a number of the passengers on the car with Mrs. Palmer, including herself, jumped from it just before the cars collided. For the injuries sustained in jumping from the car this suit was brought. The case was submitted to the jury under what the appellants regard as erroneous instructions, and the verdict having been for the defendant, this appeal was taken.

This real error complained of is the trial judge's instruction to the jury that there was no presumption of the defendant's negligence. Upon this point he said, in his general charge: "Now, gentlemen of the jury, the first question which we sub-

mit to you is this: From all of the evidence on the part of the plaintiffs and on the part of the defendant, was the defendant guilty of any negligence in the matter? If the defendant was not guilty of negligence then there can be no recovery. Where an accident happens and an injury takes place by a collision and a passenger is injured in the collision, there is a presumption of negligence; and had Mrs. Palmer remained on the car and had been injured in the collision which occurred, there would have been a presumption of negligence on the part of the company, which the company could rebut by testimony." He added in the same connection: "But in this case we say to you, it is incumbent upon the plaintiffs to show negligence and convince you of negligence." This instruction, that there was no presumption of the company's negligence, was repeated in the court's answers to plaintiffs' first and defendant's third points.

If Mrs. Palmer had remained on the car and been injured by the collision, no one would think of questioning the presumption of the defendant's negligence. The collision itself, without more, would have been evidence that some one in the employ of the company had blundered or neglected his duty. As a matter of fact, the collision was due to the breaking of a brake chain; but the case was within the unbending rule, applicable to railroad and street passenger railway companies alike, that, where a passenger on a car is injured, without fault of his own, there is a legal presumption of negligence, casting upon the carrier the onus of rebutting it: Laing v. Colder, 8 Pa. 479; Sullivan v. Philadelphia & Reading R. R. Co., 30 Pa. 234; Meier v. Pennsylvania R. R. Co., 64 Pa. 225; Philadelphia & Reading R. R. Co. v. Anderson, 94 Pa. 351; Fleming v. Pittsburg, etc., Ry. Co., 158 Pa. 130; Clow v. Pittsburg Traction Co., 158 Pa. 410; Dixey v. Philadelphia Traction Co., 180 Pa. 401; Kepner v. Harrisburg Traction Co., 183 Pa. 24; and it is immaterial that the collision was not due to any defect in the car on which the plaintiff was riding, or the machinery connected with it, but to a broken appliance on the car that ran into it; for the presumption of the defendant's negligence arises not only when the injury is caused by a defect in the road, cars or machinery, or by want of diligence or care in those employed, but by any other thing

which the company can and ought to control as a part of its duty to carry the passenger safely: Meier v. Pennsylvania R. R. Co., supra. The other thing here which was under the control of the company was the chain that broke on another car which ran into the one on which the plaintiff had been a passenger.

But the plaintiff was not bound to wait for the collision. It was rather for her, under the instinct of self-preservation, to try to escape from its danger, and, in seeking to avoid it, she is not necessarily chargeable with neglect of her own safety in exposing herself to another risk by jumping from the car. The company had confronted her with the peril from which she would have escaped, and it is and ought to be responsible to her for whatever naturally followed. In trying to save herself she was, at the same time, unconsciously trying to save the company from the consequences of its negligence, and of her effort to do so it ought to be the last to complain, unless it is manifest that she acted rashly and imprudently. "In such a case, the author of the original peril is answerable for all that follows. . . . If, therefore, a person should leap from the car under the influence of a well grounded fear that a fatal collision is about to take place, his claim against the company for the injury he may suffer, will be as good as if the same mischief had been done by the apprehended collision itself. When the negligence of the agents puts a passenger in such a situation, that the danger of remaining on the car is apparently as great as would be encountered in jumping off, the right to compensation is not lost by doing the latter; and this rule holds good, even where the event has shown that he might have remained inside with more safety:" Penna. Railroad Company v. Aspell, 23 Pa. 147. To this we can add nothing, except that a well grounded fear that a collision is about to take place, which will result in fatal or even serious injury to the passenger, is a justification to him to leap from the car; and the presumption of the common carrier's negligence is not confined to the case of injuries resulting from actual collision, but extends to those caused by an effort to escape it, when made on a well grounded belief that it will occur. The collision itself would admittedly be due to the presumed negligence of the company, and to no other cause can be attributed the manifest danger of it, from which the plaintiff in this

case attempted to escape. The court's instructions, therefore, should have been that there was a presumption of the company's negligence, and that there was no burden upon the plaintiff to prove it until the defendant had first rebutted the presumption of it.

In affirming defendant's fifth point, the court fixed too low a standard for the duty of the railway company. More is required of a common carrier than mere reasonable precaution against injuries to passengers and care that its cars and appliances are to be measured by those "in known general use." While the law does not require the utmost degree of care which the human mind is capable of imagining, it does require that the highest degree of practical care and diligence shall be observed that is consistent with the mode of transportation adopted; and cars and appliances are to be measured by those which have proved by experience to be the most efficacious in known use in the same business. The rule upon this subject, as laid down in Meier v. Pennsylvania R. R. Co., supra, and which should have been followed by the court in answering the point, is: "The utmost care and vigilance is required on the part of the carrier. This rule does not require the utmost degree of care which the human mind is capable of imagining; but it does require that the highest degree of practical care and diligence should be adopted that is consistent with the mode of transportation adopted. Railway passenger carriers are bound to use all reasonable precautions against injury of passengers; and these precautions are to be measured by those in known use in the same business, which have been proved by experience to be efficacious. The company is bound to use the best precautions in known practical use. That is the rule; the best precautions in known practical use to secure the safety of the passengers; but not every possible preventive which the highest scientific skill might suggest."

No error was committed in saying that the fact that there was a car coming and going on the same track was not in itself evidence of negligence by the defendant company, and the fifth assignment is not sustained. The court's instructions should have made it clear that, if the jury should find the plaintiff acted from a well grounded fear of imminent danger, she was not guilty of contributory negligence in jumping from

the car. In the portion of the charge complained of in the sixth assignment, the jury might have understood that, unless there was actual danger, and she jumped to escape it, she would be guilty of negligence. As the instruction upon this point was not clear, the sixth assignment is sustained. In sustaining the seventh, we need only say that the question asked Dr. Stewart was proper and should have been allowed.

All of the assignments except the fifth having been sustained, the judgment is reversed and a new trial awarded.

Bradford, Appellant, *v.* New York and Pennsylvania Telephone & Telegraph Company.

Telegraph and telephone companies—Municipalities—Laches—Estoppel—Equity.

A bill in equity filed by a municipality to compel a telegraph and telephone company to remove poles and wires from the streets is properly dismissed on the ground of the plaintiff's laches, where it appears that the municipality had permitted the defendant and its predecessors to occupy the streets with poles and wires for more than twenty-one years; that without protest or objection the municipality had stood silently by while the defendants spent from $75,000 to $100,000; that by numerous resolutions passed by both branches of council, and many of them duly approved by the mayor, consent had been given to the erection and use of the poles, cross arms, etc., on the streets and highways of the city; that, for the privileges extended by it to the defendants, it had received a valuable consideration in the use of the poles for the carrying of the wires of its fire alarm service; that it had received and duly receipted for license and pole taxes assessed against the defendants; that it had used the telephone instruments furnished by the defendants down to the date of the hearing; that it had by general ordinances, regularly passed, approved and published, regulated the manner in which the poles should be erected and placed; that a consideration to the city in extending privileges to the defendants was a reservation of "the topmost gain" for police and fire-alarm wires; and that the city had permitted all the poles of the defendants to be erected under the direction of either the street committee of council, the street commissioner or the city engineer.

Argued May 4, 1903. Appeal, No. 187, Jan. T., 1902, by plaintiff, from decree of C. P. McKean Co., Oct. T., 1901, No. 1, dismissing bill in equity, in case of Bradford v. New

York and Pennsylvania Telephone and Telegraph Company and the Pennsylvania and New York Telephone and Telegraph Company. Before DEAN, FELL, BROWN, MESTREZAT and POTTER, JJ. Affirmed.

Bill in equity for an injunction. Before MORRISON, P. J.

The bill alleged the incorporation of the plaintiff as a city of the third class, the incorporation of the defendant, the Pennsylvania and New York Telephone and Telegraph Company under the general corporation act of April 29, 1874, its supplements and amendments, with particular reference to the Act of May 1, 1876, P. L. 90, as amended by the Act of June 25, 1885, P. L. 164.

It alleged the incorporation of the defendant, the New York and Pennsylvania Telegraph and Telephone Company, under the laws of the state of New York.

It further alleged that by the acts of assembly under which the defendant, the Pennsylvania and New York Telegraph and Telephone Company is incorporated, that defendant is authorized to use and occupy the streets of the city for the purpose of constructing and maintaining telephone lines only after consent obtained from the city by ordinance. That the defendant, the New York and Pennsylvania Telephone and Telegraph Company is without authority under any circumstances to erect or maintain poles or wires on the streets of the plaintiff city.

It further averred that the defendant companies have erected and are maintaining a large number of poles in the city and have strung and placed thereon a large number of wires and cables without warrant of law or permission from the city of Bradford, and are using the same for the purpose of carrying on a telephone business and operating a telephone exchange in said city, and are continually placing new obstructions in the plaintiff city by erecting new poles and stringing new wires; that the poles so erected are owned by the Pennsylvania Corporation, the Pennsylvania and New York Telephone and Telegraph Company, and leased by them to the New York corporation, the New York and Pennsylvania Telegraph and Telephone Company, and that the plaintiff city required the defendants to remove their poles and wires from the streets

of said city, but the defendants have refused so to do. The bill asked that the defendants be restrained from erecting any new poles or stringing any new wires upon the streets of the plaintiff city and that they be required to remove the poles, wires and cables in place or erected by them.

The answer admitted the incorporation of the plaintiff city and the incorporation of the defendants as alleged in the bill; but denied that the Pennsylvania corporation comes within the provisions of the act of May 1, 1876. The defendants admitted having a large number of poles and wires on the streets of said city, as alleged in the bill, but denied that they were erected without consent of the city, and averred that the defendants are the owners of certain franchises and rights to erect and maintain poles and wires upon the streets of the plaintiff city, pursuant to the contract between the city and the Bradford Telephone Exchange made in 1879, to whose right the defendants have succeeded.

The answer averred that in pursuance of said contract, the Bradford Telephone Exchange erected a large number of poles, and strung wires upon the streets, which are now a part of the system of the defendant companies, and that the plaintiff city is now and has been, since the inception of said system, using the poles thereof for the carrying of the wires of its fire alarm system.

It averred that all poles erected and all wires strung by defendant companies were erected and strung by the proper permission of the proper authorities of the plaintiff city.

It averred that the plaintiff city had recognized the defendant companies by imposing upon them and collecting from them certain licenses from time to time.

It further averred that the defendants and their predecessors in title have exercised the rights and privileges, which they are now claiming, for a period of twenty-one years previous to the filing of the bill in this case.

It further averred that the defendant companies are engaged in interstate commerce, and are therefore entitled to the privileges and immunities granted by the constitution and laws of the United States, and further denied that the plaintiff city is entitled to the relief prayed for.

From the facts found the court held as a conclusion of law

that the city had been guilty of laches and accordingly dismissed the bill.

Error assigned was decree dismissing the bill.

W. E. Burdick and *F. P. Schoonmaker*, for appellant.—The commonwealth cannot be charged with laches: Com. v. Erie & N. E. R. R. Co., 27 Pa. 339.

George A. Berry and *John G. Johnson*, with them *D. H. Jack* and *Robert L. Edgett*, for appellees.—The city was estopped by its laches, acquiescence and contract relations: Pottsgrove Twp. v. Penna. Schuylkill Valley R. R. Co., 2 Montgomery, 133; High on Injunctions, sec. 836; Atty. General v. Del., etc., R. R. Co., 27 N. J. Eq. 1; Atty. General v. Brown, 24 New Jersey Eq. 89; Easton & McMahon v. R. R. Co., 24 N. J. Eq. 49; Penna. R. R. Co. v. Montgomery County Pass. Ry. Co., 167 Pa. 62; Com. v. Turnpike Co., 153 Pa. 47; Carlisle, etc., Ry. Co. v. Phila. H. & P. R. R. Co., 199 Pa. 532; Heilman v. Ry. Co., 175 Pa. 188; Blakely Boro. v. Del. & H. Canal Co., 2 Lack. L. N. 59; Becker v. L. & M. St. Ry. Co., 188 Pa. 484; Spahr v. Farmers' Bank, 94 Pa. 429; Johnston v. Loan Assn., 104 Pa. 394; Irvine v. Bank, 2 W. & S. 190; Collins v. Traction Co., 5 Pa. Dist. Rep. 18; Millvale Boro., 162 Pa. 374; Amberson Ave., 179 Pa. 634; Mfg. Co. v. Allentown, 153 Pa. 319.

Opinion by Mr. Justice Brown, July 9, 1903:

Under nine different heads, the court below passed upon twelve distinct questions regarded by it as involved in the decision of this case, and counsel for appellant and appellees discuss them in most elaborate printed arguments; but, as it is clear to us that the long acquiescence of the city of Bradford in what was done by the appellees and their predecessors, and its laches in filing this bill, are conclusive against its right to do so, no other question need or will be considered here.

In the court's eighth conclusion of law there is a summary of material facts, which were fairly found from the testimony. They are, that the borough of Bradford and the city of Bradford, its corporate successor, had permitted the defendants and

their predecessors in ownership for more than twenty-one years to occupy the streets and highways of the said borough and city with poles and wires; that, without protest or objection, the borough and city stood silently by while the defendants were, during this period, making, in good faith, an expenditure of from $75,000 to $100,000; that, by numerous resolutions passed by both branches of council, and many of them duly approved by the mayor, consent had been given to the erection and use of the poles, cross arms, etc., on the streets and highways of the city; that, for the privileges extended by it to the defendants, it had received a valuable consideration in the use of the poles for the carrying of the wires of its fire alarm service; that it had received and duly receipted for license and pole taxes assessed against the defendants; that it had used the telephone instruments furnished by the defendants down to the date of the hearing in the court below; that it had, by general ordinances, regularly passed, approved and published, regulated the manner in which the poles should be erected and placed; that a consideration to the city in extending privileges to the defendants was a reservation of "the topmost gain" for police and fire alarm wires, and that the city had permitted all the poles of the defendants to be erected under the direction of either the street committee of council, the street commissioner or the city engineer. In view of this acquiescence in what, at this late day, is complained of, a chancellor would unhesitatingly dismiss the bill, if the complainant were an individual. Ought any other rule to be applied to this city?

While the authorities with us are not numerous in holding that laches may be imputed to the commonwealth and municipalities in denying them equitable relief which might otherwise be granted, the rule that it can be imputed to the public is clearly laid down in several cases. "Laches may be imputed to the commonwealth as well as to an individual:" Commonwealth ex rel. Attorney General v. Bala and Bryn Mawr Turnpike Co., 153 Pa. 47. In Penna. R. R. Co. v. Montgomery Co. Pass. Ry. Co., 167 Pa. 62, we said: "But we know as matter of current history that street railways have been projected, and actually constructed, and are now in operation, over country roads where no legal consent has been obtained, and

where no attention has been paid to the rights of property holders. Such railways cannot now be torn up or enjoined either by the township officers or at the instance of landowners along their routes. Where such enterprises have been allowed to proceed and the expenditure of large sums of money has been permitted, it would be inequitable to correct at this time what was a mutual mistake under the influence of which these enterprises have been pushed to completion." What was said in Attorney General v. Delaware and Bound Brook Railroad Co., 27 N. J. Eq. 1, in denying an injunction asked for by the state, may well be regarded as applicable to the facts in the present case: "The work has been, from its commencement, a matter of public notoriety, and yet no action has been taken on the part of the state authorities, nor even any warning uttered by them against the work. The defendants have been permitted to make their immense expenditure upon their enterprise, in the confidence of their convictions that they possessed all requisite legislative authority, without even a word of protest or remonstrance. Under such circumstances, equity will refuse its aid, even to the state." A stronger case of delay or acquiescence is necessary to prevent equitable relief when sought for by the state than when a mere private right is involved; but the doctrine is applied against the public in a proceeding by the attorney general: High on Injunctions (3d ed.), sec. 837. In the present case, the acquiescence and the laches of the appellant are clearly in the way of any equitable relief to it. We pass upon no other question.

Decree affirmed and appeal dismissed at appellant's costs.

Ridgway's Account.

Equity—Mistake of fact—Evidence.

Equity will not grant relief in cases of mistake of fact except on very clear proof.

Auditor—Finding of fact—Mistake of fact—Review.

An auditor's finding of fact confirmed by the court below that a mistake of fact was not proven, will not be reversed by the appellate court in the absence of manifest error.

Equity—Mistake of fact—Statute of limitations.

Where several owners of coal lands form a corporation in which they are to take stock according to their respective interest in the lands, and the president of the corporation by a mistake does not receive his full share, he cannot, after he has remained silent for fourteen years with full means of knowledge and every opportunity to discover the mistake, and after the person to whom his shares were issued is dead, have any standing in a court of equity to have the mistake corrected.

The operation of the statute of limitations will not be stayed by the mere mistake or ignorance of a party who had full means of knowledge at hand, and this is especially true where there is no allegation of fraudulent concealment.

Argued May 11, 1903. Appeal, No. 82, Jan. T., 1903, by Jacob E. Ridgway, from decree of C. P. Fayette Company, Dec. T., 1901, No. 290, dismissing exceptions to auditor's report in In re account of Jacob E. Ridgway et al., directors of the Redstone Oil, Coal and Coke Company. Before MITCHELL, DEAN, FELL, BROWN and MESTREZAT, JJ. Affirmed.

Exceptions to report of Edward Wilson Boyd, Esq., appointed to audit the accounts of Jacob E. Ridgway and others, directors of the Redstone Oil, Coal and Coke Company.

The opinion of the Supreme Court states the case.

Errors assigned were in dismissing exceptions to auditor's report.

W. G. Guiler, for appellant.

Thomas F. McMahon and *W. D. N. Rogers*, with them *O. S. Richardson* and *Samuel P. Boyd*, for appellees.

OPINION BY MR. JUSTICE DEAN, July 9, 1903:

Jacob E. Ridgway, the appellant, with McGrath, McKay-Schellenberg, McFarland, Jacobs, Leuffer, Graham and Bowman were the owners in common of certain coal lands in Fayette county. They associated themselves as owners, not incorporated, under the name of the "Redstone Coal Company." This company or partnership continued in existence for sometime, when the parties concluded to organize as a corporation under the general act of 1874; so on May 6, 1887, the "Red-

stone Coal Company" was turned into a corporation under the name of the Redstone Oil, Coal and Coke Company. Its capital stock was $500,000 divided into 10,000 shares, each of the par value of $50.00. This capital was afterwards increased to $750,000. Within a few days after the organization, the owners in common of the lands, including the representatives of W. V. McGrath, who had died, conveyed all the lands of the Redstone Coal Company to the new corporation for which the grantors were to receive as consideration 10,000 shares of the stock of the Redstone Oil, Coal and Coke Company; on each share $5.00 was to be paid in cash into the company, as working capital, the remaining $45.00 per share to be considered as the value of the land conveyed; the owners were to be allotted shares of stock in proportion to their ownership in the land. In 1899 the corporation sold and conveyed all its property, including land, to the Pennsylvania Mining Company for the sum of $1,225,000, and the corporation was dissolved. The directors, of whom appellant is one, filed their account, showing a balance of over $1,000,000 for the stockholders of the corporation, but as the larger part had already been paid over to the stockholders, the actual sum in the hands of the accountants was only $145,312.23; and on suggestion of counsel for all parties interested, Edward Wilson Boyd, Esq., was by the court appointed auditor, "to ascertain debts if any of the Redstone Oil, Coal and Coke Company, report distribution of the funds in the hands of the accountants, first to creditors, second to other parties legally and equitably entitled thereto." Creditors' claims were few and in the aggregate small in amount mainly for costs of audit and counsel fees not disputed; but a serious dispute arose as to the amount in the fund which ought to be distributed to appellant Jacob E. Ridgway and to W. K. Brown, trustee for W. V. McGrath respectively. Ridgway claimed that at the time of the conveyance of the lands of the Redstone Coal Company to the new corporation, he was the owner of and entitled to a seventeen forty-eighth interest in the property conveyed, and consequently to that proportion of the stock of the Redstone Oil, Coal and Coke Company; that McGrath, for whom Brown is trustee, was entitled to a five forty-eighth interest. Yet he, Ridgway, was awarded only 3,336 shares of stock, which equals only a sixteen forty-eighth interest

instead of a seventeen forty-eighth; that McGrath, for whom Brown is trustee, was in fact awarded a six forty-eighth interest in the stock which was one forty-eighth interest or 205⅔ shares more than he was entitled to.

While the auditor concedes that appellant on the facts made out a strong prima facie case of mistake in apportioning the stock, he thinks it is rebutted by the countervailing evidence. Ridgway was an officer of the company; for years acquiesced in the assertion of ownership by McGrath, not only acquiesced, but officially, under oath, averred McGrath to be the owner. Taking into view Ridgway's actual knowledge of McGrath's claim, his own averments of the extent of it officially under oath, he finds that the mistake is not proven as a fact. The auditor holds, citing Bispham's Equity, sec. 196, and Claybaugh v. Goodchild, 135 Pa. 421. "Equity will not grant relief in cases of mistake (of fact) except on very clear proof." We have examined carefully the evidence and will not undertake to say that the auditor is mistaken in his finding of fact in this particular.

But outside of this finding of fact we think the auditor properly held that the statute of limitations effectually barred Ridgway's claim to have the mistake cured at the audits. On June 3, 1887, the owners of the land agreed it should be conveyed to the corporation which they had just had chartered; that Jacob E. Ridgway should have for his interest in the land 3,336 shares of the 10,000 shares of capital stock; that among others, Brown, trustee of McGrath, should have 1,250 shares. Although Ridgway afterwards took additional shares by purchase and otherwise, until he was the owner of 8,032, and Brown, trustee, took additional shares until he was the owner of 2,387, yet no mistake is alleged in the issue of these subsequent shares; if mistake was made at all, it was in the first agreement for division after the charter was issued. Before November 4, 1889, the shares as agreed upon were actually issued and delivered to the stockholders according to their agreed upon original apportionment, for Ridgway on that date makes oath that they have been so issued. Clearly a right of action either at law or in equity accrued to Ridgway to correct the mistake after the delivery of the 205⅔ shares to trustee Brown before November 4, 1889.

By a mere calculation Ridgway could have discovered the mistake if there was one at that time; as president of the company he had all the means of knowledge and every opportunity to discover it; yet for fourteen years he is silent; in the meantime McGrath and his trustee Brown are both dead. Now on the distribution of this last remnant of this large property he asserts his claim. Surely, under such circumstances, equity will not only follow the law, but the invocation of the statute is in itself equity. As the learned auditor rightly held under the authorities, Steele v. Steele, 25 Pa. 154, Montgomery's Appeal, 92 Pa. 202, and other cases, "The operation of the statute will not be stayed by the mere mistake or ignorance of a party who had full means of knowledge at hand, and this is especially true where there is no allegation of fraudulent concealment." The argument that Ridgway had no legal title to the stock which he could have asserted as a stockholder until after the dissolution, is a mistake. He had an equitable right to demand the stock represented by his proportionate interest in the land immediately after the conveyance to the corporation; a court of equity would have compelled the company to respond to his demand; if it had been issued and delivered wrongfully or by mistake to Brown, trustee, equity would have compelled him to restore it to the rightful owner or the law would have compelled him to pay damages in an action of tort for its detention or conversion.

There is nothing of merit in the other assignments of error filed by appellant which demands discussion. All the assignments of error are overruled and the decree of the court below is affirmed.

Iseminger, Appellants, *v.* York Haven Water & Power Company.

Negligence—Hole in sidewalk—Contributory negligence—Province of court and jury.

Persons walking on city streets are bound to use their eyes and watch where they are going, and failure to do so will defeat a recovery for injuries, that could have been avoided by the exercise of this reasonable care.

In an action against a water company to recover damages for personal injuries, it appeared that the plaintiff, a woman, was injured by falling into a hole twenty-four inches in diameter and six feet deep, that had been dug in the pavement of a city street by direction of the defendant. The hole was located almost directly in front of steps that led to the office of a cold storage house, and twenty inches of its diameter were in the sidewalk. In digging the dirt had been thrown into the street and there was nothing on the surface of the pavement to indicate that the hole was there. It was dug in the morning and left unguarded; the accident occurred in the middle of the afternoon. At this part of the street the distance between the curb and the building line was ten feet, but of this space only four feet nearest the curb line were paved. On the remaining space was a grass plot extending from the west end of the storage house to the office steps, crossed near the middle by a walk leading from the pavement to the engine room. The plaintiff and another woman went together to the storage house on business. They came on the street by way of an alley at the west end of the building, but turned to the east before they reached the pavement and walked on the grass plot to the engine room door. They saw the engineer sitting on the office steps, and walked on to the end of the plot to the paved way leading from the steps to the pavement. Here they stood a short time facing the building and talking to the engineer. Then they turned to the right to go further east on the pavement. In turning the plaintiff took one step backward and sideways, and fell into the hole. Both women wore sunbonnets, which obstructed a side view. Neither of them had seen the hole, nor anything that would indicate that the pavement was unsafe. *Held* (1) that it was for the jury to say whether the plaintiff was guilty of contributory negligence in taking the step backward without first looking behind her; (2) that it was for the jury to determine whether the defendant was negligent in leaving the hole unguarded.

It is only in clear cases where the facts and the inferences to be drawn from them are free from doubt that the court is warranted in saying that there was contributory negligence.

Argued May 18, 1903. Appeal, No. 30, Jan. T., 1903, by plaintiff, from order of C. P. York Co., Aug. T., 1902, No. 117, refusing to take off nonsuit in case of Almira F. Iseminger and Charles E. Iseminger v. York Haven Water & Power Company. Before MITCHELL, DEAN, FELL, BROWN and POTTER, JJ. Reversed.

Trespass to recover damages for personal injuries. Before BITTENGER, P. J.

The circumstances of the accident are stated in the opinoin of the Supreme Court.

Error assigned was refusal to take off nonsuit.

Charles A. Hawkins, of *Black & Hawkins*, with him *W. B. Gemmill*, for appellants, cited: Fee v. Columbus Borough, 168 Pa. 382; Wood v. Bridgeport Boro., 143 Pa. 167; Philadephia v. Smith, 23 W. N. C. 242: Feather v. Reading, 155 Pa. 187; Bruch v. Philadelphia, 181 Pa. 588; Strader v. Monroe County, 202 Pa. 626; Fox v. Booth, 22 Pitts. Legal Jour. 117; Harrison v. Collins, 86 Pa. 153; Butcher v. Philadelphia, 202 Pa. 1; Houston v. Traphagen, 47 N. J. L. 23; Polenske v. Lit Bros., 18 Pa. Superior Ct. 474; Engel v. Smith, 82 Mich. 1 (46 N. W. Repr. 21).

Nevin M. Wanner, with him *Niles & Neff*, for appellees, cited: Stackhouse v. Vendig & Co., 166 Pa. 582; King v. Thompson, 87 Pa. 365; Farley v. Phila. Traction Co., 132 Pa. 58; City of Phila. v. Smith, 23 W. N. C. 242; Barnes v. Sowden, 119 Pa. 53; Haven v. Bridge Co., 151 Pa. 620; Shallcross v. Phila., 187 Pa. 143.

Opinion by Mr. Justice Fell, July 9, 1903:

The plaintiff, Elmira F. Iseminger, was injured by falling into a hole twenty-four inches in diameter and six feet deep, that had been dug in the pavement of a city street by direction of the defendant. The hole was located almost directly in front of steps that led to the office of a cold storage house, and twenty inches of its diameter were in the sidewalk. In digging the dirt had been thrown into the street and there was nothing on the surface of the pavement to indicate that the hole was there. It was dug in the morning and left unguarded; the accident occurred in the middle of the afternoon. At this part of the street the distance between the curb and the building line was ten feet, but of this space only four feet nearest the curb line was paved. On the remaining space was a grass plot extending from the west end of the storage house to the office steps, crossed near the middle by a walk leading from the pavement to the engine room. The plaintiff and another woman went together to the storage house on business. They came on the street by way of an alley at the west end of the building, but turned to the east before they

reached the pavement and walked on the grass plot to the engine room door. They saw the engineer sitting on the office steps, and walked on to the end of the plot to the paved way leading from the steps to the pavement. Here they stood a short time facing the building and talking to the engineer. Then they turned to the right to go further east on the pavement. In turning the plaintiff took one step backward and sideways, and fell into the hole. Both women wore sunbonnets, which obstructed a side view. Neither of them had seen the hole, nor anything that would indicate that the pavement was unsafe.

The question raised by this appeal is whether on this state of facts the court was right in entering a nonsuit on the ground of contributory negligence. We are not disposed to relax the rule, repeatedly stated, that persons walking on city streets are bound to use their eyes and watch where they are going, and that failure to do this will defeat a recovery for injuries that could have been avoided by the exercise of this reasonable care. But was there a failure in this case on the part of the plaintiff to exercise the care that the law exacts? There was no negligence in her failure to see the hole before she reached the place in which she stood while talking to the engineer. She had not been on the pavement and had not intended going on it, and there was no occasion for her looking for an obstruction of any kind and nothing to attract her attention to the hole. As she was walking across the grass plot, she looked first towards the door of the engine room, and afterwards towards the office steps, but at no time towards the pavement. When she reached the end of the plot, she stepped on the open space about four feet square at the foot of the office steps, which were directly in front of her. Up to this time the hole had not been in the direct line of her walk nor of her vision. As she turned to the right to leave, she naturally, in order to make room for her companion who was standing at her left, took a step backwards and to one side, and thus placed her foot in the hole, which extended nearly half way across the pavement. Can it be said as matter of law that she was negligent in taking this step backward without first looking behind her? The final analysis of the case brings it down to this point. She undoubtedly took the risk of or-

dinary inequalities in the surface of the pavement and of slight obstructions which are to be expected and must be looked for, and if she had walked on the pavement she might be held to have been negligent in not seeing the hole. But without fault on her part she was exposed to an unusual and unforeseen danger which she could avoid only by turning around and looking before taking a step. The exceptional facts may make the case a close one, and place it near the border line, but as there was at least a doubt whether the plaintiff exercised ordinary care under the circumstances, the question was for the jury. It is only in clear cases where the facts and the inferences to be drawn from them are free from doubt that the court is warranted in saying that there was contributory negligence.

The question whether the defendant was negligent in leaving the hole unguarded was considered but not passed upon at the trial. That question, we think, was also for the jury.

The judgment is reversed with a procedendo.

Miller, Appellant, *v.* Fulton.

Orphans' court—Jurisdiction—Mutual accounts—Statute of limitations.

The orphans' court has no jurisdiction to adjudicate two items of claims against the estate of a decedent where there were between the decedent and the claimant numerous transactions in which there were mutual obligations requiring an account which could only be adjusted in a court of general equitable jurisdiction. Such an adjudication by the orphans' court of the two claims will not prevent the running of the statute of limitations against the claims.

Argued May 18, 1903. Appeal, No. 89, Jan. T., 1903, from decree of C. P. York Co., Jan. T., 1903, No. 3, dismissing bill in equity in case of Joseph S. Miller v. James C. Fulton, Administrator of A. C. Fulton, deceased. Before MITCHELL, DEAN, FELL, BROWN and POTTER, JJ. Affirmed.

Bill in equity for an account.

W. F. Bay Stewart, J., filed the following opinion:

Practically the whole history of this case is contained in Fulton's Appeal, 178 Pa. 78. In the opinion then filed by myself, and published in that case, all matters arising on evidence in this case, except that referring to the Match Company stock, were discussed. The case was reversed upon the question of the admissibility of Dr. Miller's pass book as a book of original entries; but it was then seen that there were difficulties arising out of the case which involved the settlement of the accounts between the plaintiff and the decedent, and which could not be adjusted by a proceeding in the orphans' court. The Supreme Court, through Mr. Justice Mitchell, said: "The effect of the adjudication is to allow appellee (Dr. Miller) to enforce payment of part of an admittedly unsettled account, and to turn over the other side to another suit for what may be due to him. This cannot be done. The matters are closely interwoven, and were never separated by the parties; they must go together to a common settlement now. The orphans' court could not deal adequately with the whole account, nor can we in this proceeding. None of the items therefore can be allowed separately. . . . It is a case for amicable adjustment by reference to one or more arbitrators to take up the whole account in the same capable manner that the learned auditor took up the part that he thought within his jurisdiction and reach as equitable a result as is now possible. Failing to agree on this, however, the parties must be left to their remedies on the matters as a whole." This opinion was filed October 5, 1895. Subsequently, there was a proceeding in the common pleas in partition of the real estate held by decedent and Miller jointly. The defendants undertook in that proceeding, to claim, out of the proceeds of the sale of real estate sold after proceedings in partition, moneys claimed to have been advanced by decedent toward the improvement of the real estate. This was disallowed in the court below, and an appeal was taken to the Supreme Court. In a per curiam opinion the Supreme Court said: "The settlement of the complicated accounts between the parties cannot be adjusted in this proceeding. Had the suggestion made in the opinion of this court in Fulton's Appeal, 178 Pa. 78, been followed, it is quite probable this litigation would have been ended before now, but as that has not been

done, a bill in equity is perhaps the only available remedy;" Fulton v. Miller, 192 Pa. 60. This opinion was delivered May 24, 1899. After this the same auditor, Daniel K. Trimmer, who had been the auditor before, was again appointed to make distribution of the balance on the account, and reported a distribution to which exceptions were filed. The report was set aside, and again an appeal was taken to the Supreme Court, and on October 11, 1901, the decision was sustained in an opinion delivered by Mr. Justice MITCHELL, in which he stated further: "The parties have been distinctly notified, both by the orphans' court and by this court, that their accounts could not be settled in this proceeding, and that it was a case for amicable reference or a bill in equity. The fact that the appellee's claim has been reduced to two items does not vary the status of the case, for it clearly appears that these items are not separate debts of the decedent which could be proved in the orphans' court, but are parts of numerous transactions in which there were mutual obligations, requiring an account which can only be adjusted in a court of general equity jurisdiction. Notwithstanding this repeated warning, however, the parties have not chosen to regard it. Without going at all into the merits, the appellee is the one technically at fault. He came into court with a claim which could not be adjudicated there, and he was so told and the proper forum pointed out to him. He has refused or neglected to proceed. It is not equitable that he should hold the settlement of the estate in suspense indefinitely:" Fulton's Estate, 200 Pa. 545.

In considering and overruling the demurrer as to the Slate Quarry and Klinedinst claims, I came to the conclusions that these two items had been adjudicated in the orphans' court, and that therefore they had been seated upon the fund, and were consequently not barred by the statute of limitations. A further consideration of this matter has led me to a different conclusion. The authority upon which I relied was Reber's Appeal, 125 Pa. 20, in which it was held "that the adjudication and allowance of a claim in the distribution of a decedent's estate by an auditor, followed by a decree of the orphans' court confirming the auditor's report, is as effective to toll the bar of the statute of limitations as would be a judgment at law, and in such case the statute is inoperative." While proof was sub-

mitted in support of the Slate Quarry and Klinedinst claims sufficient to satisfy the auditor and the court of the receipt of these moneys by the decedent, yet I am of the opinion that the findings of the auditor's report upon that, the subsequent confirmation of them by the orphans' court, and the recognition by the Supreme Court of the correctness of those findings do not amount to an adjudication of these claims in favor of the plaintiff, for the reason that the orphans' court did not have the jurisdiction to determine whether the decedent was indebted to the plaintiff for those amounts of money as separate items. They were still subject to a final settlement and adjudication of all the claims of the plaintiff and the claims of set-off presented by the defendant, and no determination of their validity could be arrived at until all matters in controversy between the plaintiff and the decedent had been finally adjudicated and a balance ascertained in favor of one or the other. This view of the matter was taken by Justice MITCHELL in 178 Pa. 78, when he said: "The auditor, with great ability, showed that two items, the Slate Quarry claim and the Klinedinst claim, were capable of separate statement and settlement, but he could not show that the parties had ever so stated or settled them. On the contrary, the evidence is that they never did so, and there is nothing to enable the court to say that when the whole account is stated the balance due by decedent on those two items may not be offset by a balance due to him on others. The effect of the adjudication is to allow appellee to enforce payment of part of an admittedly unsettled account and to turn over the other side to another suit for what may be due to him. . . . The orphans' court could not deal adequately with the whole account, nor can we in this proceeding. None of the items, therefore, can be allowed separately."

And again in Fulton's Estate, 200 Pa. 545: "The parties have been distinctly notified, both by the orphans' court and by this court that their accounts could not be settled in this proceeding, and that it was a case for amicable reference or a bill in equity. The fact that the appellee's claim has been reduced to two items does not vary the status of the case, for it clearly appeared that these items are not separate debts of the decedent, which could be proved in the orphans' court but are parts of numerous transactions in which there were mutual obligations,

requiring an account which can only be adjusted in a court of general equitable jurisdiction."

I, therefore, conclude that the adjudication in the orphans' court was not such a one as could finally determine the right of the plaintiff to recover the amount of the Slate Quarry and and Klinedinst claims; that they were not seated upon the fund as where a matter, of which the orphans' court has proper jurisdiction and which has been heard and determined in its favor and finally confirmed by the orphans' court, would be; that they are not within the doctrine of Reber's Appeal, 125 Pa. 20.

The trusts averred in the amendment to the bill are not such technical and continuing trusts as are not at all cognizable at law but fall within the proper peculiar and exclusive jurisdiction of courts of chancery, as decided in Lyon v. Marclay, 1 Watts, 271; Finney v. Cochran, 1 W. & S. 112; Fleming v. Culbert, 46 Pa. 498; York's Appeal, 110 Pa. 69; Hostetter v. Hollinger, 117 Pa. 606.

An action for money had and received would no doubt lie for each item: Lyon v. Marclay, and Finney v. Cochran, supra.

This being the case the plaintiff could have brought suit on one or all of the claims in controversy in the common pleas court, the Slate Quarry claim and Klinedinst claim not having been seated upon the trust, for the reason that the orphans' court did not have jurisdiction to determine finally, it follows, therefore, that the statute of limitations applies to all of them. The statute was running at the time of the death of decedent in February, 1892, and this bill was not filed until November 27, 1901, a period of almost ten years after the death of decedent. Even if the matters in controversy between the plaintiff and the decedent could be considered as matters of partnership, which is not averred in the bill, the statute of limitations would apply since an action to compel an accounting for partnership assets, brought against a surviving partner more than six years after the death of the plaintiff's intestate, is barred by the statute of limitations: Hamilton v. Hamilton, 18 Pa. 20; McKelvy's App., 72 Pa. 409; Everhart's App., 106 Pa. 349; Guldin v. Lorah, 141 Pa. 109.

The decision on the demurrer filed February 24, 1902, overruling the demurrer as to the Slate Quarry claim and the

Klinednist claim was, therefore, erroneous, and is now reversed, and the statute of limitations is allowed as against all the claims set up in plaintiff's bill, and the demurrer is sustained as to the whole of plaintiff's bill.

Error assigned was decree dismissing bill.

Edward Chapin, with him *N. Sargent Ross*, for appellant.

Richard E. Cochran, with him *Smyser Williams* and *N. M. Wanner*, for appellee.

PER CURIAM, July 9, 1903:

This decree is affirmed on the opinion of the learned judge below.

Stoner, Appellant, *v.* Erisman.

Slander—Actionable words—"Damned bitch"—Innuendo—Amendment.

Where words may have a double or doubtful meaning, the plaintiff may by innuendo charge which meaning he attributes to them, and it will be for the jury to find whether they were spoken with that meaning or not.

While the word "bitch" is frequently used as a general term of opprobrium without any reference to chastity, still it is often used as meaning a lewd woman.

Plaintiff declared for slander by the words "damned bitch," laid with an innuendo that she, being a married woman, was thereby charged with having been guilty of adultery. After the statute of limitations had run in favor of the defendant, plaintiff sought to amend the statement by adding the words "whore and" before the others. *Held* that the amendment should have been allowed, and the question left to the jury with instructions that if they find that the words were used with intent by the defendant, or in such manner as to be understood by the hearers in the sense charged, they might find for the plaintiff without proof of special damages, and might also consider the words in the amendment, but otherwise they must disregard the word "whore" (if proved) and find for the defendant unless special damage was shown.

An amendment introducing a new cause of action will not be permitted after the statute of limitations has run in favor of the defendant; but if the amendment is merely a restatement of substantially the same cause of action, though in a different form, the variance in form will not prevent the amendment.

Argued May 19, 1903. Appeal, No. 99, Jan. T., 1903, by plaintiff, from judgment of C. P. Lancaster Co., Dec. T., 1901, No. 30, for defendant in case of Lizzie A. Stoner v. John Erisman. Before MITCHELL, DEAN, FELL, BROWN and POTTER, JJ. Reversed.

Before LANDIS, J.

On plaintiff's application a rule was granted to show cause why her statement should not be amended. Prior to the trial the rule was discharged. On the trial the amendment was offered; on its denial a bill was sealed. No testimony was offered and binding instructions were given for defendant. Plaintiff appealed.

Error assigned was the refusal of amendment.

C. E. Montgomery, for appellant, cited: Proper v. Luce, 3 P. & W. 65; Moles v. Crozier, 48 P. L. J. 216; Knapp v. Hartung, 73 Pa. 290.

Wm. H. Keller, of Coyle & Keller, for appellee.

OPINION BY MR. JUSTICE MITCHELL, July 9, 1903:

It is conceded that an amendment introducing a new cause of action will not be permitted after the statute of limitations has run in favor of the defendant. But if the amendment is merely a restatement of substantially the same cause of action, though in a different form, the variance in form will not prevent the amendment.

The plaintiff declared for slander by the words, "damned bitch," laid with an innuendo that, she being a married woman, was thereby charged with having been guilty of adultery. The amendment offered was to add the words "whore and" before the others, and the question is whether this would introduce a new charge (it being admitted that the statute had run since the speaking of the words), or merely presented the same substantial charge in a different form. The original statement as already said laid the words with an innuendo, "thereby meaning the said plaintiff to charge with the crime of adultery."

The learned judge below was of opinion that, even with the innuendo, the words were not actionable per se. "If this amendment is allowed, the defendant will be answerable for a slander per se, provided the jury believe that he is guilty of having spoken the words therein alleged. But, on the other hand, if the plaintiff is confined to what she originally stated was her cause of action, no recovery can be had, because, to call a woman a 'damned bitch' is not actionable, and particularly is this so as no special damages are alleged." In this he fell into error by taking too narrow a view of the popular meaning and use of the term bitch. "Whether the language is capable of bearing the meaning assigned by the innuendo is for the court; whether the meaning is truly assigned to the language is for the jury:" Townshend on Slander, sec. 342, ed. 1890. That the word is sometimes, perhaps frequently, used as a general term of opprobrium without any definite reference to chastity, may be true, but that it is capable of such reference, both in the intention of the speaker and the understanding of the hearers, the lexicographers leave no doubt. The new Oxford dictionary, the highest single authority in the language, defines bitch, inter alia, "applied opprobriously to a woman; strictly a lewd or sensual woman;" Webster, "an opprobius name for a woman; especially a lewd woman;" Chambers (1898), "a term of reproach for a lewd woman;" March's Thesaurus, "a wench or lewd woman." Other dictionaries, while defining it as a word of opprobrium, omit this special feature of it. "The sense in which words are received in the world is the sense which the courts ought to ascribe to them. . . . . The cases show that the words are to be taken as they are ordinarily understood by the bystanders:" Bricker v. Potts, 12 Pa. 200. Where words may have a double or doubtful meaning, the plaintiff may by innuendo charge which meaning he attributes to them, and it will be for the jury to find whether they were spoken with that meaning or not: Townshend sec. 336.

The words in the present case are laid with a colloquium which tends to sustain the innuendo. As the words so understood import a charge, as said by Chief Justice GIBSON in Proper v. Luce, 3 P. & W. 65, "generically the same" as that in the amendment, it follows that the court could not refuse to allow

the amendment as necessarily introducing a new cause of action, but that it should be allowed, and the question left to the jury with instructions that if they find that the words were used with intent by the defendant, or in such manner as to be understood by the hearers in the sense charged, they may find for the plaintiff without proof of special damages, and may also consider the words in the amendment, but otherwise they must disregard the word "whore" (if proved), and find for the defendant unless special damages be shown.

Judgment reversed and amendment directed to be allowed.

Zook *v.* Pennsylvania Railroad Co., Appellant.

Equity—Question at issue—Railroad—Siding on street—Grade.

The only issues to be passed upon in a suit in equity are those raised by the pleadings.

Where the sole object of a bill in equity is to prevent a railroad company from laying a siding in a street in any other manner than upon the established grade of the street, the court cannot consider the question of the power of the city councils to grant permission to the railroad company to construct a siding upon the street.

Railroad—Streets—Grading—Siding above established grade.

On a bill in equity to restrain a railroad company from laying a siding in a street in any other manner than upon the established grade of the street, the plaintiff is entitled to relief where it appears by the preponderance of proof that the tracks as laid in the manner contemplated would be nine and five eighths inches above the established grade; that embankment thus made would seriously interfere with access to plaintiff's property; that water in larger quantities than before would be cast upon plaintiff's land, and that the work was being done without any supervision by the street committee of councils, in violation of the ordinance which authorized the work.

Argued May 20, 1903. Appeal, No. 130, Jan. T., 1903, by defendants, from decree of C. P. Lancaster Co., Equity Docket No. 4, page 3, on bill in equity in suit of Emma Zook v. The Pennsylvania Railroad Company and G. Sener & Sons, W. Z. Sener and J. Fred. Sener. Before MITCHELL, DEAN, FELL, BROWN and POTTER, JJ. Affirmed.

Bill in equity for an injunction. Before LANDIS, J.

The court found the facts to be as follows:

While the facts of this case, as brought out upon the final hearing, differ in only a few respects from those which were ascertained by us upon the hearing of the motion to dissolve the preliminary injunction, yet, as this is the final hearing, we are bound, under the equity rules, to again specifically find them, so that the case may be intelligently presented for review.

It is not denied that Mrs. Zook, the plaintiff, is a resident of the city of Lancaster, and that she owns a tract of land, with warehouses and storehouses erected thereon, located on the north side of a public street in the said city, known as Harrisburg avenue, near its junction with North Mulberry street. These buildings are used for the packing and storing of tobacco. The tracks of the Quarryville branch of the Columbia and Reading railway have been laid upon North Mulberry street, between James street and Harrisburg avenue, and thence, crossing northward over Harrisburg avenue, run a short distance to the west of the buildings of the plaintiff, to meet the tracks of the main line of the Columbia and Reading railway, which lie farther to the north. Formerly, these tracks were laid in accordance with the provisions of the charter of the Lancaster and Narrow Gauge Railroad Company, at grade; but several years ago the Pennsylvania Railroad Company raised its bridge at the place where its main line crosses under North Mulberry street, and, because of this change, it, at the same time, raised the tracks of the Quarryville road for a distance of at least seventy-five feet on each side. Subsequently the tracks of the Quarryville road were also raised at Harrisburg avenue, and they are now at that place from nine to ten inches above the grade of the street. There was no authority given by the city of Lancaster for the making of any such changes as these, and, as we shall hereafter ascertain, it is extremely doubtful whether such authority could have been given. But no action, however, has been taken on the part of the city to re-establish the former condition.

The main tracks of the Pennsylvania Railroad Company, which is a corporation incorporated under the laws of the state of Pennsylvania and doing business and owning and operating

railroad tracks and sidings, lie to the westward. G. Sener & Sons, the defendants, who are a firm composed of William Z. Sener, J. Fred. Sener and others, are engaged in the coal and lumber business in this city. They have purchased a tract of land immediately to the east of the plaintiff's property, and they now propose to run a siding from the tracks of the Pennsylvania Railroad Company along Harrisburg avenue to their own property. It will thus be observed that the plaintiff's property lies between the main line of the Pennsylvania Railroad Company and the property of G. Sener & Sons.

Some years ago the Pennsylvania Railroad Company ran a siding from its main tracks eastward along Harrisburg avenue over ground where a pavement has since been laid, along the south side of that street, to a frame building, which is now said to be used by its employees as a carpenter shop. This siding extends up to a point from about 100 to 130 feet of the Quarryville railroad tracks. Some time after it was put down by the Pennsylvania Railroad Company that company pushed it out into the street on Harrisburg avenue, filled in with dirt the place where it formerly was, and then laid a pavement at that place. It is now proposed by G. Sener & Sons to extend that siding further along Harrisburg avenue, longitudinally, eastward, and to cross, diagonally, from the south side of that street to the north side, and across the tracks of the Quarryville branch of the Columbia and Reading railway, in front of the plaintiff's property, thence continuing along Harrisburg avenue, and crossing the gutter on the north side of that street, about fifty feet east of the Zook property, and in upon their own premises. The effect of this will be that the tracks of the siding will run about twelve feet from the curb line of the street before the Zook property, and they will be raised to the same height as those of the Quarryville branch of the Columbia and Reading railway, which, as we have before said, are now between nine and ten inches above grade; to be strictly accurate they are, according to actual measurement, nine and five eighths inches above grade, and the fall from the tracks to the bottom of the gutter will be thirteen and one fourth inches.

Prior to the commencement of the work now complained of, an ordinance was adopted by the city councils of the city of Lancaster, and approved by the mayor, whereby the said

G. Sener & Sons were given the right and privilege to lay a siding railroad track on Harrisburg avenue to connect with the main line of the Pennsylvania Railroad Company at a point on the south side of the said Harrisburg avenue, and to extend eastward on the siding now on the south side of Harrisburg avenue and across said Harrisburg avenue at Mulberry street into their property fronting on said Harrisburg avenue and arrived at said point in said public road, near Maysville Park Prince street; provided that the said work should be done under the supervision of the street committee. There was, however, nothing contained in the ordinance whereby the defendants were permitted to lay the track above the grade of the street. In pursuance of authority claimed by them under the said ordinance, the said G. Sener & Sons made an arrangement with the Pennsylvania Railroad Company by which it should do the work of laying the siding for them. Near daybreak, on the morning of June 3, 1902, about seventy-five men, employees of the Pennsylvania Railroad Company, under the direction of Mr. Wiseman, the supervisor of said company, began to lay the said siding above the grade of the street, and had it completed to a considerable extent, the frog being placed at its junction with the Quarryville branch, and the ties being laid, but the dirt and ballast not being yet filled in, when they were stopped by the injunction granted in pursuance of this bill.

There is no doubt that the tracks, as thus laid, will be above the grade of the street, and it has been shown by a preponderance of proof—and we, therefore, find it as a fact—that the effect of this will be to render it difficult, if not impossible, for the plaintiff to have access to her property from Harrisburg avenue if this change is made, especially so with large teams, and that the entrance and exit to and from the building and the use of it will be incumbered and hindered. In addition it has also been shown that, since the shedding has been erected upon the Sener property, a larger amount of water collects on Harrisburg avenue, and that this water drains upon her property in larger quantities than it formerly did before any such change was made, and that, if the track is completed as proposed, the Zook property will be, to a more or less extent, damaged by reason of water draining thereon in larger quan-

tities than before. The water naturally drains to the northwest, and the change will cause an undue diversion of it.

It is said by Mr. J. Fred. Sener that it was not the intention of the defendants to lay the tracks on the grade of Harrisburg avenue, as that street is at the present time, and it was also admitted by him that the street will have to be filled up in order to make access possible to the Zook property. But there has been no change in the grade and no authority shown under which any such filling in can be legally done in the said street.

It is because of these grievances and in order to protect herself against them that the plaintiff has filed the present bill.

The court entered the following decree:

That the defendants, G. Sener & Sons, William Z. Sener and J. Fred. Sener, and the Pennsylvania Railroad Company, their officers, agents, operators and workmen, are hereby enjoined and restrained perpetually, by the order and injunction of this court, from laying a railroad track or siding on Harrisburg avenue, in the city of Lancaster, to connect with a siding of the Pennsylvania Railroad Company, at a point from 100 to 130 feet west of the tracks of the Quarryville branch of the Columbia & Reading Railroad Company, and extending eastward, on the south side of Harrisburg avenue, and crossing diagonally said avenue at Mulberry street over the tracks of the said Quarryville branch of the Columbia & Reading Railway Company, and further along Harrisburg avenue, and into the property of the said G. Sener & Sons, which fronts upon said street; and also from laying said siding above the established grade of said Harrisburg avenue, and from placing or erecting any ballast, ties or other obstructions over and upon said avenue above the established grade thereof; and they are further enjoined and restrained perpetually from interfering or intermeddling with the established grade of the said street or avenue before the plaintiff's premises by laying any railroad track or siding thereon.

Error assigned was the decree of the court.

A. B. Hassler, with him *H. M. North*, for appellants.—When persons are authorized to lay a siding on and across a street,

such persons can lay such siding on the grade of the street as they find it: Warren v. Henly, 31 Iowa, 31; Commonwealth v. Wilkes-Barre, etc., Ry. Co., 127 Pa. 278; Winton Boro. v. Scranton, etc., R. R. Co., 1 Lack. Jur. 190; Duke v. Baltimore, etc., R. R. Co., 129 Pa. 422; Detroit v. Fort Wayne, etc., Ry. Co., 90 Mich. 646 (51 N. W. Repr. 688); Chicago, etc., R. R. Co. v. Quincy, 136 Ill. 563 (27 N. E. Repr. 192); Middlesex R. R. Co. v. Wakefield, 103 Mass. 261.

The court cannot enjoin a defendant for reasons other than those stated in the bill: Cumberland Valley Railroad Co.'s Appeal, 62 Pa. 218; Morio's Appeal, 4 Penny. 398; Horton's Appeal, 13 Pa. 67: Delaware & Hudson Canal Co. v. Pennsylvania Coal Co., 21 Pa. 131; Passayunk Building Association's Appeal, 83 Pa. 441.

W. U. Hensel, for appellee.—The siding must be laid at the established grade: Duke v. Baltimore, etc., R. R. Co., 129 Pa. 422; Shamokin Boro. v. Shamokin, etc., Elec. Ry. Co., 196 Pa. 166.

A municipality may be authorized to change the grade of a street and compel all persons to conform to the new grade thus established, provided it compensates those who are damaged, but it cannot under its general powers legalize an obstruction in the public street to the detriment of the private owner without express sanction of the legislature.

When the decree is entirely consistent with the general objects of the bill, with the prayer for general relief and with the proof, it will not be reversed because of immaterial variances of the reasons upon which it is based from those upon which it is asked: Wallace v. Loomis, 97 U. S. 146; Preston v. Loughran, 12 N. Y. Sup. 313; Vail v. Hammond, 60 Conn. 374 (22 Atl. Repr. 954); White v. Allatt, 87 Cal. 245 (25 Pac. Repr. 420); Doherty v. Holiday, 32 N. E. Repr. 315.

Opinion by Mr. Justice Brown, July 9, 1903:

The real defendants below were G. Sener & Sons. The complaint of the appellee, as set forth in her bill, is, that, under an ordinance passed by the councils of the city of Lancaster, authorizing them to lay a siding railroad track on Harrisburg avenue, in the city of Lancaster, to connect with the main line

of the Pennsylvania railroad, they were about, without any authority so given by said ordinance, to change the grade of said Harrisburg avenue as established by law, and to lay the said track or siding in front of her property at an elevation above the grade of the avenue and above the surrounding grade and level of the street or avenue, in such manner as to interfere with her property, to obstruct ingress and egress thereto and therefrom, to prejudice, damage and despoil the same, to imperil the same by great damage from water, and, in many and various ways, to interfere with and incumber her in the use of her property and in the use of said street or avenue, and her prayer for relief is "that the said G. Sener & Sons, William Z. Sener and J. Fred Sener, and the Pennsylvania Railroad Company, their officers, agents, operatives and workmen, be enjoined and restrained, now temporarily, and hereafter perpetually, by the order and injunction of this court, from laying said railroad track or siding above the established grade of said street or avenue, and from placing or erecting any ballasting, ties, railroad track, or other obstruction, along, over and upon the said street or avenue, and from digging any ditches, making any embankments, or in any way incumbering the said Harrisburg avenue, and from interfering or intermeddling with the established grade of said street or avenue, in any other manner, than to lay their said track upon the established grade thereof."

In awarding the injunction restraining the defendants from laying the siding, the learned judge below relied chiefly on the want of power in the city councils to grant permission to construct it. This question is not raised by the pleadings and cannot enter into the decision of the case. The only issues to be passed upon in a suit in equity are those raised by the pleadings: Thompson's Appeal, 126 Pa. 367; Pennsylvania Schuylkill Valley Railroad Co. v. Philadelphia and Reading Railroad Co., 160 Pa. 277; Morios's Appeal, 4 Pennypacker, 398. What the plaintiff below complained of was not that the defendants were about to lay the siding, but that they were about to lay it at an elevation above the grade of the avenue, in such a manner as to interfere with her property rights; and the prayer is not for an injunction to restrain them from laying it, but from laying it "in any other manner" than "upon the established

grade" of the street. We are to consider only that of which she complains, and determine whether or not, in the light of it, she is entitled to the specific relief asked for.

One of the conclusions of the court below was, that "the ordinance granting permission to G. Sener & Sons to erect their siding, even if an exercise of powers legally vested in council, must necessarily be authority for a construction only on the grade of the street." The correctness of this proposition cannot be questioned, and to it the appellants seem to take no exception; but, to avoid the effect of it, they say that they proposed to lay the siding on the street as they found it. The answer to this, however, is, that the court has properly found as a fact from the testimony that "it will also be necessary to fill up the street to the level of the siding, and it will cause to be maintained at or about the center of the street an embankment, device and construction of nine and five eighths inches above its grade."

On the material allegations of the bill, as to the unlawful constructions of the siding by the defendants and the injury resulting from such construction of it to the plaintiff, the findings of the court, which we will not disturb, were: "There is no doubt that the tracks, as thus laid, will be above the grade of the street, and it has been shown by a preponderance of proof —and we, therefore, find it as a fact—that the effect of this will be to render it difficult, if not impossible, for the plaintiff to have access to her property from Harrisburg avenue if this change is made, especially so with large teams, and that the entrance and exit to and from the building and the use of it will be incumbered and hindered. In addition it has also been shown that, since the shedding has been erected upon the Sener property, a larger amount of water collects on Harrisburg avenue, and that this water drains upon her property in larger quantities than it formerly did before any such change was made, and that, if the track is completed as proposed, the Zook property will be, to a more or less extent, damaged by reason of water draining thereon in larger quantities than before;" and another finding was: "The ordinance under which the defendants proceeded to lay this track provides that a track or siding should be laid under the supervision of the street committee of councils. No evidence has, however, been presented before us

to show that the work was being so done, or that even the street commissioner or any member of the street committee had any notice that it was about to be done, or was consulted about the manner in which it was being done, and no authority from the city to make the fill and change the grade has been presented by any one, nor had any provision been made to perform or pay for such work."

These findings were fairly found from the testimony, and, in view of them, the specific relief prayed for by the plaintiff "protection from what would be a continuing injury to her property and interference with her full and free use of it" could not have been withheld by the court below. So much of the decree as perpetually enjoins G. Sener & Sons, William Z. Sener and J. Fred. Sener, and the Pennsylvania Railroad Company, their officers, agents, operators and workmen, from laying a siding above the established grade of Harrisburg avenue, in the city of Lancaster, and from placing or erecting any ballast, ties or other obstructions over and upon the said avenue above the established grade thereof in front of plaintiff's property, and from interfering or intermeddling with the established grade of the said street at said point, is affirmed, the costs below, as well as on this appeal, to be paid by G. Sener & Sons, W. Z. Sener and J. Fred Sener.

Central Guarantee Trust & Safe Deposit Company *v.* White, Appellant.

Practice, C. P.—Trial—Instructions—Points.

Where a trial judge has given a binding direction as to the verdict, what he says to the jury in explanation or comment on the case, and his refusal to answer points, become entirely immaterial.

Points are statements of the rules or principles of law, specially applicable to the case, and therefore given to the jury as guides in applying the law to the facts. But where the jury has no such duty and the judge himself determines the combined result of the law and the facts as presented, points become immaterial.

Banks and banking—Checks—Certified checks.

A check by a depositor on his account certified by the bank becomes an

obligation of the bank to the payee or holder, and in the absence of fraud or similar exceptional circumstances the amount is as much withdrawn from the depositor's account as if the money had been paid over the counter.

Lunacy—Signing of check—Evidence—Province of court and jury.

On an issue to determine whether a person who signed a check had sufficient mental capacity at the time of the signature, three physicians testified that he had been suffering a mental and physical decline for several years from senile paresis, and in their opinion was not competent to transact business at the time he drew the check. They all, however, admitted that the alleged incompetent took care of himself, and went about town attending to all his ordinary business. None of the physicians testified to a single unbusinesslike act on the part of the maker of the check. The testimony as to the mental capacity of the maker was clear and positive. *Held*, that the court below committed no error in not submitting to the jury the evidence of the maker's mental incapacity.

Argued May 20, 1903. Appeal, No. 106, Jan. T., 1903, by defendant, from judgment of C. P. Lancaster Co., Aug. T., 1899, No. 84, on verdict for plaintiff in case of Central Guarantee Trust & Safe Deposit Company v. William S. White and Henry A. White, Administrators of William White, deceased. Before MITCHELL, DEAN, FELL, BROWN and POTTER, JJ. Affirmed.

Issue to determine the validity of a check.

From the record it appeared that the check in controversy was drawn by William White on March 2, 1899, on the Lancaster Trust Company, in the sum of $1,500. The check was drawn in favor of a son who lived in Harrisburg and certified by the Trust Co. Shortly after the check was given, White removed to his son's home in Harrisburg, where he died on March 26, 1899. After the father's death, Thomas C. White, the son, presented the certified check to the Central Guaranty Trust and Safe Deposit Company of Harrisburg, and received a cashier's check for $1,500. In the meantime other sons of the decedent notified the Lancaster Trust Company not to pay the check signed by their father. When the check was presented payment was refused. Subsequently the trust company of Harrisburg brought an action against the Lancaster Trust Company to recover the amount of the check. Thereafter the Lancaster Trust Company paid

the money into court, and an issue was framed between the Central Guarantee Trust & Safe Deposit Company of Harrisburg and the administrators of William White, to test the validity of the check and to determine the ownership of the fund paid into court. The evidence as to the maker's alleged mental incapacity at the time he signed the check is summarized in the opinion of the Supreme Court.

The court gave binding instructions for plaintiff. Defendant appealed.

Errors assigned were (1) in giving binding instructions for plaintiff; (3–11) various instructions.

Thomas B. Holahan and *B. F. Davis*, for appellant.—The question of the maker's incapacity should have been submitted to the jury: Samuel v. Marshall, 3 Leigh, 567.

W. U. Hensel and *H. M. North*, with them *John E. Patterson*, for appellee.—There is no evidence whatever justifying the submission to the jury of the question of fraud or want of capacity: Elcessor v. Elcessor, 146 Pa. 359; Bank v. Wirebach, 97 Pa. 543; Dickinson v. Dickinson, 61 Pa. 401; Zell v. Com., 94 Pa. 258; Shreiner v. Shreiner, 178 Pa. 57; Eddey's App., 109 Pa. 406.

Opinion by Mr. Justice Mitchell, July 9, 1903:

The learned trial judge having given a binding direction as to the verdict, what he said to the jury in explanation, or comment on the case, and his refusal to answer points, became entirely immaterial. Points are statements of the rules or principles of law, especially applicable to the case, and therefore given to the jury as guides in applying the law to the facts. But where the jury has no such duty and the judge himself determines the combined result of the law and the facts as presented, points become immaterial. "The correctness of the direction to the jury to find in one way or another depends on the facts admitted or established, and if the conclusion is right on the facts no error is committed though the reasons assigned are insufficient or even incorrect:" Meyers v. Kingston Coal Co., 126 Pa. 582.

The assignments of error in the present case from third to eleventh inclusive are therefore immaterial, and will be disregarded.

A check by a depositor on his account certified by the bank becomes an obligation of the bank to the payee or holder, and in the absence of fraud or similar exceptional circumstances the amount is as much withdrawn from the depositor's account as if the money had been paid over the counter. The check in controversy was certified in the regular course of business during the lifetime of the drawer. All questions of consideration, etc., raised by the appellant are irrelevant.

The basis of appellant's case is that the check was obtained by the payee by fraud and imposition on an imbecile father. There was no evidence of the alleged fraud and imposition beyond what might be imputed by inference from the fact that a son whose relations had not for some years been close, received nearly the whole of the father's estate a short time before the latter's death. But the undisputed circumstances exclude any such inference. The father who had lived for many years in Lancaster had reasons for leaving there and going to live with the son in Harrisburg which ought to satisfy a jury if it were any of the jury's business to pass upon them. But unless he was non compos it was his right to change his residence and prefer one of his sons, and neither his other children nor a jury have any standing to question his action.

The only real question in the case therefore is whether there was sufficient evidence of mental incapacity on the part of the father, to require the submission of that matter to the jury. Substantially the whole evidence on the part of defendants on this point was the testimony of three physicians that the deceased had been suffering a mental and physical decline for several years from senile paresis, and in their opinion was not competent to transact business at the time he drew the check in controversy. Dr. Snyder testified that he was called in to examine whether the decedent "was physically able to be removed to Harrisburg," and from that single visit (having never seen him before) was rash enough to express the opinion that he had not "mind enough to transact business or make a contract," and that he was suffering from "the imbecility of age." Dr. Davis had had the advantage of knowing the decedent for

twenty-five years and testified also that he was suffering from senile paresis and "had not sufficient physical and mental ability to transact business of any import," but admitted that "he went about and took care of himself," and that his condition "was about the same as it had been for possibly two or three years previous to that . . . . I think he was failing both physically and mentally for four or five years previous to that time." Dr. Eberman had also known the deceased for many years, and testified that he "was weak both bodily and mentally, had noticed that some time prior to the time I saw him in March his mind was giving way, probably due to paresis" which had "probably been going on for three or four years as far as I was able to judge from his case," and that there was a pronounced difference for the worse between his condition in March, 1899, and two or three years before. But the same witness also testified that the decedent "went about town" during the preceding two or three years, and that he, the witness, knew nothing of his business habits, and could not mention an unbusinesslike thing he ever knew the decedent to say or do. There was some other testimony, chiefly from interested members of the family as to lapses of memory, but not of importance enough to be recounted here. The foregoing is a full summary of the medical testimony on the subject of mental incapacity. It is weak of its kind, and its kind is the very lowest that is ever allowed in a court of justice. Standing by itself the admission that during all the period in question the alleged incompetent took care of himself, went about town attending to all his ordinary business, and the entire failure to show a single unbusinesslike act on his part would so far neutralize the theoretical opinions of the physicians as to his mental capacity, that if the judge had ruled it insufficient to go to the jury we could not have said he was in error. But in this case there was positive testimony to the contrary. The witness to the note testified to the circumstances of its execution by the decedent, his clear understanding of what was wanted, and sending for pen and ink to write his signature. It was shown that in the previous year he had conducted a suit for divorce without showing any indication of want of mental capacity, and the only disinterested witness, Hartmeyer, who had testified to facts of loss of memory was shown to have taken a deed

of conveyance from him within two years of his death. Other witnesses, including the physician who attended him in his last illness, testified to his mental competency. On the whole case if the jury had found a verdict against the plaintiff the court would have been bound to set it aside as clearly against the weight of the evidence, and that being so he was right in directing the verdict.

As the whole basis of the appellant's defense thus failed, the remaining assignments of error upon the admission of testimony do not need discussion.

Judgment affirmed.

Second National Bank of Pittsburg, Appellant, *v.* Guarantee Trust and Safe Deposit Company of Shamokin.

Banks and banking—Checks—Forgery—Indorsement.

One who has paid a check to one holding under a forged indorsement may recover back the amount if he proceeds with due diligence.

A beneficial association drew a check on a bank payable to the order of a brother of a beneficiary. The brother's name was forged upon the back of the check. The forged indorsement was followed by another indorsement, and the last indorsement, that of a trust company, expressly guaranteed the previous indorsements. The check was drawn upon a bank which was the depository of the beneficial association. The check was paid. Subsequently on discovery of the forgery, the bank demanded the money back from the trust company, and upon the latter's refusal to pay, brought suit. The trust company filed an affidavit of defense alleging that the check had been drawn by the beneficial association without proper precaution, inasmuch as the beneficiary was still alive. It then imputed this negligence to the bank as depository of the association. *Held*, that the affidavit of defense was insufficient to prevent judgment.

Argued May 25, 1903. Appeal, No. 201, Jan. T., 1902, by plaintiff, from order of C. P. Northumberland Co., May T., 1901, No. 187, discharging rule for judgment for want of a sufficient affidavit of defense in case of Second National Bank of Pittsburg v. Guarantee Trust and Safe Deposit Company of Shamokin. Before Mitchell, Dean, Fell, Brown and Potter, JJ. Reversed.

Assumpsit to recover money paid on a draft with a forged indorsement.

The draft was as follows:

"SUPREME TENT,

K. O. T. M. of the World. No. 5624.

"PORT HURON, Mich., Oct. 6, 1900.

"Pay to the order of John Davis brother and beneficiary of Benjamin Davis of Tent No. 75 State of Penn. ($3000.00) Three Thousand Dollars and charge to Life Benefit Fund, Supreme Tent K. O. T. M.

"To Second National Bank Pittsburg, Penn. Designated Depository. } D. P. MARKEY, Supreme Com. G. J. SEIGLE, Supreme R. K.

"Endorsements.

"John Davis brother and beneficiary of Benjamin Davis of Tent No 175, State of Penn.

"O. J. Reed, Record Keeper of Tent 175, Shamokin, Pa.

"Pay to the order of any Bank, Banker or trust Co. Previous endorsements guaranteed. The Guarantee Trust and Safe Deposit Company, Shamokin, Pa.

"HENRY L. LEAN.
"Treasurer."

The affidavit of defense was as follows:

That on October 6, 1900, O. J. Reed, a Record Keeper of Tent No. 175, Shamokin, Pa., of the Knights of the Maccabees, upon fraudulent proofs of death of a man by the name of Benjamin Davis, who was insured in the life benefit fund of the Supreme Tent of the Knights of the Maccabees of the World, for the benefit of his brother, John Davis, obtained a draft from the order of Maccabees, for the sum of $3,000, payable to the order of John Davis. It was alleged that the said O. J. Reed forged the indorsement of the said John Davis upon the said draft, and presented the same to the Guarantee Trust and Safe Deposit Company of Shamokin, Pa., and through it had it forwarded for collection to the Second National Bank of Pittsburg, Pa., the depository of the Knights of Maccabees, which said bank, the plaintiff in this suit, remitted the amount

of the said draft, so collected, to the defendant, that the said defendant had no notice of the said fraud or forgery until October 31, 1900, when notice was received by the defendant that it was suspected that a fraud had been perpetrated by the said O. J. Reed upon the Supreme Tent of the Knights of the Maccabees of the World, in obtaining the said draft, which was finally confirmed by subsequent notice on November 2, 1900.

The deponent avers that it was through the carelessness and negligence of the Knights of the Maccabees and the fraud and forgery of its agent, the said O. J. Reed, Record Keeper of Tent No. 175, of Shamokin, Pa., that a death claim was approved by the said order, and a draft issued when, with proper precaution it would have been ascertained that the man insured was alive; that the said order of the Knights of the Maccabees put in circulation the said fraudulent draft by means of which the said defendant indorsed the same, and forwarded it for collection to its agent, the plaintiff, in the city of Pittsburg, and had not the said draft been carelessly and negligently issued and put in circulation by the Knights of the Maccabees, the said defendant would not be called upon to pay the said fraudulent and forged draft, and the deponent is advised, and therefore avers in behalf of the said defendant, that the said order of the Knights of the Maccabees cannot lawfully recover the amount of the said draft declared upon, so fraudulently issued by it and negligently put into circulation, and that the plaintiff in this suit, being the depository of the funds of the said order of the Knights of the Maccabees, is in no better position, and is not entitled in law to recover the amount of said draft so negligently put in circulation, for the reason that it is the agent of the said order of the Knights of the Maccabees, which is responsible for the amount of the said draft, by reason of its carelessness and negligent management, and carelessly and negligently putting into circulation the said draft, based upon a death claim when, with ordinary diligence, it could have ascertained that the person insured was alive.

The court discharged the rule for judgment for want of a sufficient affidavit of defense.

Error assigned was the order of the court.

W. H. M. Oram, for appellant.—Whatever may be the law

in other states, in Pennsylvania the right of the payor to recover back the money paid on a draft, the signature or indorsement of which is forged, is now settled, both by statute and authority: Act of April 5, 1849, P. L. 424; Corn Exchange Nat. Bank v. Bank of the Republic, 78 Pa. 233; United Security Co. v. Cent. Nat. Bank, 42 W. N. C. 145; Lehigh Coal & Nav. Co. v. Blakeslee, 189 Pa. 13; McConeghy v. Kirk, 68 Pa. 200; Iron City Nat. Bank v. Fort Pitt Nat. Bank, 159 Pa. 46; Land Title & Trust Co. v. Northwestern Nat. Bank, 196 Pa. 230; Tradesmen's Nat. Bank v. Third Nat. Bank, 66 Pa. 435; Rick v. Kelly, 30 Pa. 527; Roth v. Crissy, 30 Pa. 145.

S. P. Wolverton, with him *A. G. Marr*, for appellee, cited: States v. First Nat. Bank of Montrose, 203 Pa. 69; Iron City Nat. Bank v. Fort Pitt Nat. Bank, 159 Pa. 46; Nassau Bank v. Nat. Bank of Newburgh, 159 N. Y. 456 (54 N. E. Repr. 66); Coggill v. American Exchange Bank, 1 N. Y. 113; Merchants' Loan & Trust Co. v. Bank of the Metropolis, 7 Daly (N. Y.), 137.

Opinion by Mr. Justice Potter, July 9, 1903:

This is an appeal from the order of the court below discharging a rule for judgment for want of a sufficient affidavit of defense.

On, or about October 6, 1900, the Supreme Tent of the Knights of Maccabees of the World drew a draft upon the Second National Bank of Pittsburg, payable to the order of John Davis, a brother and beneficiary of Benjamin Davis, of Tent No. 175, Shamokin, Pa. The draft, however, seems not to have been paid to John Davis, the payee, or to his order. His name was, however, forged by some one and appears upon the back of the draft. It is followed by the indorsement of O. J. Reed, Record Keeper of Tent No. 175, Shamokin, Pa. This indorsement is again followed by that of the Guarantee Trust & Safe Deposit Company, Shamokin, Pa., which also guarantees the previous indorsements.

The draft bearing these indorsements was presented to the plaintiff bank for payment on October 12, 1900, and was paid by it. Afterwards upon the last day of the same month, the

plaintiff was notified not only that the indorsement of the name of John Davis, the payee of the said draft, was a forgery, but that a fraud had been perpetrated upon the beneficial order by falsely representing that Benjamin Davis, a member of the order, was dead, and that his beneficiary, John Davis, was therefore entitled to receive the amount of the death benefit. Plaintiff at once notified the defendant of the fraud and shortly afterwards demanded repayment of the money for the draft. This was refused and this suit was brought to recover from the defendant as indorser.

The defendant in its affidavit of defense admits all the facts of the transaction, but endeavors to avoid liability by averring that the draft was issued by the order of the Knights of Maccabees without proper precaution having been taken to ascertain whether or not the person insured was alive. It then imputes this alleged negligence of the beneficiary order to the plaintiff bank, by reason of its being the depository of the funds of the said order. The matter which it is thus sought to inject into the case as a defense has no proper place there.

The liability of the defendant here is that of an indorser. The form in which its indorsement was placed upon the back of the draft, was not the mere writing of its name there, which of itself would create an implied warranty of the genuineness of the previous indorsements, but it was more; the defendant expressly guaranteed the previous indorsements. What reason then is there for excusing it from complying with the terms of its contract? None that we can discover in the affidavit of defense. This action is between the bank and the last previous indorser. The drawer of the draft is not a party. The duty of the defendant is to take up the draft, as it agreed to do in case anything was found wrong with the previous indorsements, and then it in turn can fall back upon the party from whom it received the draft, and who indorsed to it. We fail to see any relevancy whatever in the suggestion that the beneficial order was negligent in issuing a draft to pay a death benefit for a member who was yet alive. That is not the point in this case. Whether or not it failed to make due inquiry matters not in this proceeding. That would go only to the question of consideration as between the order and the beneficiary Upon what it considered satisfactory proof, the order

drew its draft upon the bank for a sum of money, payable to the order of John Davis. It had a right to require that its direction in this respect should be carried out. The draft was payable only upon the order of John Davis. And until John Davis did actually order or direct the payment of a draft to some one else, the title to the instrument remained in him, and never properly passed from him. When the defendant therefore took the draft without knowing whether or not the signature of John Davis, which appeared upon the back of the draft, was genuine, it took the instrument at its own peril. Its liability in this respect was expressly recognized by its volunteering to guarantee the previous indorsements. The form in which the defendant indorsed the draft, makes clear its intention not only to transfer, but to be bound as indorser, and as guaranteeing the validity of the prior indorsements. The defendant is, therefore, clearly liable in this case. To hold otherwise would be to deny to the plaintiff the benefit of the general rule that one who has paid a bill or draft to one holding it under a forged indorsement may recover back the amount if he proceed with due diligence.

The order discharging the rule is reversed, and the record is remitted to the court below with directions to enter judgment for the plaintiff unless other legal or equitable cause be shown to the court below why such judgment should not be entered.

Goodman *v.* Coal Township, Appellant. Czinski *v.* Coal Township, Appellant. Belter *v.* Coal Township, Appellant.

Negligence—Joint tort feasors—Action.

In a suit for a joint tort there can be no recovery upon proof of one or more separate torts. When a joint tort is charged a joint tort must be proved in order to sustain the action. The allegation and the proof must agree in cases of tort as in other cases.

An action against a township and a street railway company to recover damages for personal injuries sustained by the alleged dangerous and unsafe condition of a public road and the railway tracks thereon, cannot be maintained where neither under the facts as set forth in the statement of claim, nor as shown upon the trial, was there any concert of action between the township and the railway company.

Argued May 25, 1903. Appeals, Nos. 65, 66 and 67, Jan. T., 1902, by defendants, from judgment of C. P. Northumberland Co., Feb. T., 1900, Nos. 107, 108 and 109, on verdict for plaintiffs in cases of Isaac Goodman, August Czinski and Catharine his wife, and Andrew Belter, v. Township of Coal and Shamokin & Mt. Carmel Electric Railway Company. Before MITCHELL, DEAN, FELL, BROWN, MESTREZAT and POTTER, JJ. Reversed.

Trespass to recover damages for death of wives of two plaintiffs and for personal injuries to wife of another plaintiff. Before SAVIDGE, P. J.

The court refused binding instructions for defendants and submitted the case to the jury.

Verdict and judgment for plaintiff Goodman for $5,000.

Verdict and judgment for plaintiff Czinski for $3,500.

Verdict and judgment for plaintiff Belter for $5,000.

Defendants appealed.

Errors assigned were in not giving binding instructions for defendants.

S. P. Wolverton and *W. W. Ryon*, for appellant.—There was no concert of action and no joint action could, therefore, be maintained: Dutton v. Lansdowne Borough, 198 Pa. 563; Howard v. Union Traction Co., 195 Pa. 391; Wiest v. Electric Traction Co., 200 Pa. 148; Hart v. Allegheny County Light Co., 201 Pa. 234; Minnich v. Lancaster, etc., Ry. Co., 203 Pa. 632.

James Scarlet and *W. H. M. Oram*, with them *J. H. M'Devitt*, *J. E. Bastress* and *L. S. Walter*, for appellee.

OPINION BY MR. JUSTICE POTTER, July 9, 1903:

Three suits in trespass were brought against the township of Coal, Northumberland county and the Shamokin and Mt. Carmel Electric Railway Company by Isaac Goodman, Andrew Belter and August Czinski and wife respectively, the first two to recover damages for the death of plaintiffs' wives and the last for injuries sustained by Mrs. Czinski, one of the plaintiffs. In their statements of claim the plaintiffs all declared against

the two defendants as joint trespassers. The three cases, having arisen from the same state of facts, were tried together and resulted in verdicts for the plaintiffs in each case. This opinion is therefore intended to apply to each case.

On the evening of October 15, 1899, about dusk, the three women were driving in a buggy on the public road leading from Shamokin to Mt. Carmel and within Coal township. This road is crossed by the tracks of the Shamokin and Mt. Carmel Electric Railway Company. As the buggy containing the women was crossing the tracks of the railway company, it was overturned and its occupants were thrown out into the ditch at the side of the road. Mrs. Goodman was instantly killed, Mrs. Belter was injured so seriously that her death ensued in a few days and Mrs. Czinski suffered severe and permanent injuries. The plaintiffs alleged that the railroad tracks, either from the negligent manner of their construction or from the failure to keep them in proper repair, were dangerous to persons driving across them and that this unsafe condition of the tracks was the cause of the accident.

In their statements the plaintiffs sought to charge the township with negligence because it had failed in its duty to keep the highway in good order and repair and in a condition safe for public travel, and also to charge the railway company with negligence for constructing its tracks across the public highway in a negligent and unsafe manner, thus creating a dangerous impediment and obstruction to public travel. They also charged the township with negligence in permitting the railway company to obstruct the highway and render it unsafe for travel. The statements all concluded with averments that, by reason of the joint carelessness and negligence of the defendants, "the said township of Coal in not keeping the said public road in good condition and repair and safe for public travel, and in allowing the said obstruction, depression, defects and imperfections to remain therein after due notice thereof, and the said Shamokin and Mt. Carmel Electric Railway Company in erecting, constructing and placing said obstructions, depressions and imperfections in said road and keeping and maintaining the same therein so as to render and keep the said public road dangerous and unsafe for public travel," the plaintiffs had sustained their injuries.

The court below declined to give binding instructions for the defendants and permitted the jury to find verdicts against them both as joint tort feasors. As to that aspect, these cases cannot be distinguished in principle from Dutton v. Lansdowne Boro., 198 Pa. 563, Wiest v. Electric Traction Co., 200 Pa. 148, and Rowland v. Philadelphia, 202 Pa. 50. In Wiest v. Traction Company, it was said (p. 152): "If no concert of action is shown, and therefore no joint tort, and the case is one of separate tort or torts, upon the part of one or of several defendants, the action is not sustained, and there should be no verdict against any one. In a suit for a joint tort there should be no recovery upon proof of one or more separate torts. When a joint tort is charged, a joint tort must be proved, in order to sustain the action. The allegation and the proof must agree in cases of tort, as in other cases."

This case is emphasized as stating the correct rule in the late case of Minnich v. Lancaster, etc., Electric Railway Company, 203 Pa. 632.

There can be no doubt under the above authorities that the torts here complained of, were separate, not joint. Neither under the facts as set forth in the plaintiffs' statement nor as shown upon the trial was there any concert of action apparent between the township and the railway company. Upon the record as it stood at the time of the trial, and upon the plaintiffs' evidence, no verdict could have been properly rendered against any one, and the defendants were entitled to binding instructions in their favor. But as pointed out in Rowland v. Philadelphia, 202 Pa. 50, and Minnich v. Lancaster, etc., Electric Railway Company, 203 Pa. 632, the plaintiffs would have had the right, if the question of joint liability of the defendants had been directly raised upon the trial, to amend the statement and proceed against either one of the parties who may have been liable under the proofs adduced, and subject to the defendant's right to a continuance.

While the judgment must be reversed, it is proper that a new venire should be granted, in order that the plaintiffs may now elect which of the defendants to follow, and that the statement may be amended accordingly.

The judgment in each case is reversed and a venire facias de novo is awarded.

Shamokin Borough *v.* Shamokin and Mt. Carmel Electric Railway Company, Appellant.

Street railways—Municipalities—Paving.

Where a street railway company is under contract to pave the full width of a street where sidings are maintained, whenever the borough paves the rest of the street, the street railway company may remove the siding before such paving is begun; and if in good faith it gives notice to the borough prior to the ordinance, authorizing the paving, of its intention to remove the siding, and further notifies the borough three months before the latter incurs any liability that the siding will be removed as soon as frost is out of the ground, and the siding is actually removed, the company cannot be held liable for paving the full width of the street at the point where the siding was located.

Argued May 25, 1903. Appeal, No. 165, Jan. T., 1902, by defendant, from judgment of C. P. Northumberland Co., Dec. T., 1901, No. 82, on verdict for plaintiff in case of Shamokin Borough v. Shamokin and Mount Carmel Electric Railway Company. Before MITCHELL, DEAN, FELL, BROWN and POTTER, JJ. Affirmed with modification.

Assumpsit to recover the cost of paving a street. Before SAVIDGE P. J.

The facts are stated in the opinion of the Supreme Court.

The court gave binding instructions for plaintiff.

Verdict and judgment for plaintiff for $4,941. Defendant appealed.

Error assigned was in giving binding instructions for plaintiff.

S. P. Wolverton, with him *S. P. Wolverton, Jr.*, for appellant, cited: Pottsville Borough v. People's Ry. Co., 148 Pa. 175; Willis v. Erie City Pass. Ry. Co., 188 Pa. 56.

W. H. M. Oram and *W. H. Unger*, for appellee, cited: Norristown v. Norristown Pass. Ry. Co., 148 Pa. 87; Shamokin Borough v. Shamokin St. Ry. Co., 178 Pa. 128.

OPINION BY MR. JUSTICE FELL, July 9, 1903:

The defendant company was authorized by ordinance of

March 2, 1893, to construct a single track railway with necessary sidings on certain streets in the borough of Shamokin. In pursuance of this ordinance, it laid a single track on one side of Sunbury street, and a siding 400 feet long on the other side. The intention of the company was to use this siding in connection with a branch road which was never built, and the siding was not used except occasionally for the storage of cars. The road was constructed in advance of street improvements, and the ordinance imposed on the company the duty to pave the parts of the streets on which its tracks were laid, and to pave the whole width of the streets from curb to curb where sidings were laid, when the borough should pave the other parts of the streets. It was further provided by the ordinance that if the company failed after notice to pave the streets, the work might be done by the borough, and the cost thereof with a penalty of twenty per cent might be recovered from the company. This action was to recover the cost of paving the whole of that part of Sunbury street where the siding had been placed. The company admitted its liability for the cost of paving the part of the street on which its track was laid, but denied the right of the borough to recover the whole cost of the pavement, on the ground that it had given notice to the borough of its intention to remove the siding, before the ordinance authorizing the paving was approved. A verdict was directed for the plaintiff for the whole cost.

The facts were not in dispute. In June, 1898, the company requested the borough to consent to the removal of the siding, and to the placing of its main track on the center line of the street, or if this was thought objectionable, to consent to the removal of a part of the siding. Notice was given at the same time that if both requests were refused, the company would remove the siding. This request was peremptorily refused by the borough in August of the same year. In November, 1898, the council was asked to appoint a committee to confer with a committee of the company on this subject. This request was refused. Later in the same year a committee of the company appeared before the council in regard to taking up the siding. The council refused its consent, and declined to accede to any proposition presented. An ordinance to authorize the paving of the street was presented to the council on

January 3, 1899, passed third reading on February 7, and was approved by the burgess on February 20. On February 13 a written notice was given by the company to the burgess and council that it had determined to remove the siding, which was unnecessary for its operations and a needless incumbrance on the street, and that it proposed to remove the same as soon as the frost was out of the ground, and in any event would remove it before the grading and paving should begin. The borough invited bids for the work on April 20, and entered into a contract with a paving company for the paving of the street on May 31, 1899. Soon afterwards the company began to remove the siding, when it was enjoined on the application of the borough. The preliminary injunction was dissolved on September 12, 1899, and the siding was then taken up. The right of the company to remove was finally determined on appeal to this court on May 23, 1900. See Shamokin Borough v. Shamokin, etc., Electric Railway Co., 196 Pa. 166.

The learned trial judge states in his charge that there was nothing in the testimony that indicated that the notice of an intention to remove the siding was not given in good faith and for the reason that the siding was unnecessary for the operation of the railway, and that the delay in removing it until the work of excavation for the paving had begun was a prudent measure, because it served the public convenience by avoiding the tearing up of the street twice, as well as the company's interest, since it could more easily be removed at that time. He concluded, however, that the notice of February 13, 1899, was too late to relieve the company of its liability to pay for the paving from curb to curb of that part of the street on which the siding was located.

This conclusion would be warranted if the borough had paved in reliance on the conduct of the company. But it did not. The council relied on the belief that as matter of law it could prevent the removal of the siding, and thus for all time place the cost of street improvements on the company. In this it was mistaken. It had notice nearly two years before of the company's intention to remove the siding, and had distinct notice before the approval of the ordinance, and three months before it incurred any liability of the company's determination to remove it as soon as the frost was out of the ground. It

may be assumed that the purpose of the company in removing a useless siding was to free itself from the cost of paving in the future. It is certainly clear that the purpose of the council was to keep the siding in place until the time of paving arrived. Each party stood in its supposed legal right, one seeking to avoid and the other to impose the cost of a future street improvement. The company's liability to pave the full width of the street was conditional only. It related to the parts of the streets on which sidings were laid, and arose only when the borough should pave the rest of the street. The fact that a siding had once been placed on the street, would not make the company liable forever. If it became necessary to relocate the siding, the company would be liable for the paving of the new location and relieved as to the old one. If as in this case it was found unnecessary, its removal would relieve the company from all liability. The obligation was in effect to pave the full width where sidings were maintained.

It was admitted at the trial that the company was liable for the cost of paving the part of the street occupied by its single track, and that this amount with interest to the trial was $1,220.21. Since an order reversing the judgment with a new venire would cause the delay and expense of another trial to recover an amount admitted to be due, we now direct that the judgment appealed from be reduced from $4,149 to $1,220.20, with interest from the date of the verdict. With this modification the judgment is affirmed.

Cooper's Estate.

Will—Conversion—Power to sell.

In order to work a conversion of a testator's land into money from the time of his death, there must be either, "1st. A positive direction to sell; or, 2nd. An absolute necessity to sell in order to execute the will; or, 3d. Such a blending of real and personal estate by the testator in his will, as to clearly show that he intended to create a fund out of both real and personal estate, and to bequeath the said fund as money."

Testator directed as follows: "I direct that my farm be leased if the same can be done to advantage, otherwise I direct that my executor shall

sell the same at public or private sale, at such time as he shall deem it expedient so to do, and I hereby authorize and empower him to make good and sufficient deed for conveying the same to the purchaser." This clause was followed by gift to his wife of half of the income or proceeds of sale of the estate when sold, with the residue to certain persons named. *Held*, that there was no such positive direction or absolute necessity to sell as to work a conversion from the death of testator.

Where no conversion of land takes place under a will until by sale at the expiration of more than two years from date of testator's death, the proceeds of the sale are discharged from all liability for the payment of decedent's debts. When the debts ceased to be a lien upon the land upon the expiration of the two years, they ceased also to be payable out of the proceeds of the sale of the land.

Argued May 25, 1903. Appeal, No. 270, Jan. T., 1902, by Annie Cooper, from decree of O. C. Perry Co., dismissing exceptions to auditor's report in es te of Josiah K. Cooper. Before MITCHELL, DEAN, FELL, BROWN and POTTER, JJ. Reversed.

Exceptions to report of Luke Baker, Esq., auditor.

From the record it appeared that the testator died on July 26, 1898, leaving to survive him a widow but no children. The evidence showed that the testator in his lifetime gave various notes to nephews and nieces. The will is quoted in the opinion of the Supreme Court. The executor after leasing the farm sold it on September 21, 1900, for $5,100. The whole of the personal estate was applied to the payment of debts other than the notes given to nephews and nieces. It appeared that these notes were given without consideration. The auditor sustained by the court applied a portion of the proceeds of the sale to the payment of the notes, thus postponing the widow.

Errors assigned were in dismissing exceptions to auditor's report.

B. F. Junkin, with him *Grafton Junkin*, for appellant.—There was no conversion from the death: York's App., 110 Pa. 69; Howard's App., 2 Pennypacker, 347.

W. N. Seibert, of *Seibert & Seibert*, and *Charles H. Smiley*, for appellees.—There was such a blending of the real and personal estate by the testator in his will as to clearly show that he in-

tended to create a fund out of both real and personal estate. and to bequeath the fund as money: Dundas's App., 64 Pa, 325; Page's Est., 75 Pa. 87; Roland v. Miller, 100 Pa. 47; Hunt's and Lehman's Apps., 105 Pa. 128; Marshall's Est., 147 Pa. 77; Klotz's Est., 190 Pa. 152; Mustin's Est., 194 Pa. 437; Keim's Est., 201 Pa. 609; Rauch's Est., 21 Pa. Superior Ct., 60.

Opinion by Mr. Justice Brown, July 9, 1903:

Josiah K. Cooper, the testator, died July 26, 1898, and the controlling question raised on this appeal is whether, by the terms of his will, there was a conversion of his real estate from his death, or from September 21, 1900, the time it was sold by his executor. The clauses in the will from which it must be determined when the conversion took place are: "Third. I direct that my farm be leased if the same can be done to advantage, otherwise I direct that my executor shall sell the same at public or private sale, at such time as he shall deem it expedient so to do, and I hereby authorize and empower him to make good and sufficient deed for conveying the same to the purchaser. Fourth. I give and bequeath to my wife, Annie Cooper, the one half of all proceeds from my estate arising from real or personal effects when the same is sold. She to have the one half of the proceeds of the farm during the term of any lease thereof. This bequest to be in lieu of all dower, right of dower and exemption. Fourth. I give and bequeath all the rest and residue of my estate or the proceeds thereof to Mary J. Linn, of Connelsburg, Mahoning county, Ohio, Geo. A. Cooper, J. D. Cooper, Samuel C. Cooper, Frederick S. Cooper, and Harry Cooper, Elam Cooper, sons of Andrew Cooper, deceased, share and share alike."

Conversion takes place from the death of the testator only when there is a positive direction to sell. If, as was said in Hunt's and Lehman's Appeals, 105 Pa. 128, and subsequently repeated in Irwin et al. v. Patchen et al., 164 Pa. 51, anything ought to be settled by this time, it is that, in order to work a conversion of a testator's land into money from the time of his death, there must be either, "1st. A positive direction to sell; or, 2nd. An absolute necessity to sell in order to execute the will; or, 3rd. Such a blending of real and personal estate by the testator in his will, as to clearly show that

he intended to create a fund out of both real and personal estate, and to bequeath the said fund as money." "The direction to sell must be absolute and unconditional:" Stoner v. Zimmerman, 21 Pa. 394. "To establish a conversion, the will must direct it absolutely, *or out and out*, irrespective of *all* contingencies:" Anewalt's Appeal, 42 Pa. 414; and, "unless there be an imperative direction to sell, irrespective of contingencies and independent of discretion, conversion will not take place until the sale is actually made: Anewalt's Appeal, 6 Wright, 414; Henry v. McCloskey, 9 Watts, 145;" Peterson's Appeal, 88 Pa. 397. "It must not rest in the discretion of the executor, nor depend upon contingencies:" Jones v. Caldwell, 97 Pa. 42. "It must be imperative, not contingent or discretionary merely, or a conversion does not take place until the sale is actually made:" Mellon v. Reed, 123 Pa. 1.

In the case before us there is no positive direction to sell. It is in the alternative. The first and positive direction is that the farm be leased, and no limitation is put upon the time for which it is to be leased. It is to be leased if it can be leased to advantage, that is, so long as it can be leased to advantage, and only "otherwise," that is, when the executor can no longer lease it to advantage, is it to be sold. It might have been leased to advantage during the lifetime of the widow, and she would have received one half of the proceeds during that period; and there is no direction to sell at her death. The sale which the executor was authorized to make depended upon a contingency which might never have happened. The testator may have thought that his farm would have to be sold, but he gave no unconditional direction to sell it, and it might have been leased to advantage indefinitely. As there was no conversion under a positive direction to sell, so there was no absolute necessity to sell in order to execute the will, for the leasing of the farm during the lifetime of the widow and giving her one half of the proceeds during life would have carried out the provisions of the will. Nor does the intention of the testator clearly appear that, from the time of his death, there should be such blending of his real and personal estate as to create a fund out of both to be bequeathed to the legatees as money, for such a blending depended entirely upon whether or not the alternative direction to the

executor to sell should be carried out. There were to be no proceeds from the sale of the farm, unless the same should be sold after it was learned that it could not be leased to advantage. The conversion of the testator's farm took place, therefore, when, in the exercise of the mere discretion reposed in the executor, to be exercised only on a certain condition, it was sold on September 21, 1900,—more than two years after the death of the testator.

As there was no conversion of the farm until September 21, 1900, the notes given to the appellees ceased to be liens upon it on July 26, 1900, when two years had expired from testator's death. It is not necessary for us to consider the purpose for which the appellant alleges these notes were given, for, even if in each instance, they were executed and delivered by the decedent for a valuable consideration, and represented his bona fide indebtedness, they ceased to be liens upon his real estate at the expiration of two years from his death, because the holders had not, as required by the Act of June 8, 1893, P. L. 392, brought suits upon them. If, after July 26, 1900, the testator's land was discharged from all liability for the payment of these notes, the proceeds of a subsequent sale of it were not bound by them; and if, after that date, the holders of the notes could not have looked to the land, how can they turn to the purchase money for payment? The notes may have represented debts of the testator, for which his land was liable at the time of his death, and would have continued so, if the statute had been followed; and his personal estate might have been indefinitely held for their payment, but the proceeds of the sale of his farm, at the time it was sold, formed no part of his estate, real or personal. The land itself had been freed from the obligation of his unsecured debts on July, 26, 1900, and whatever took its place was equally absolved. In Kerper v. Hoch, 1 Watts, 9, and Commonwealth v. Pool, 6 Watts, 32, in passing upon a statute similar in its provision to the act of June 8, 1893, it was held that the limitation annexed to the lien of a debt of the decedent on his lands was not exclusively for the security of purchasers, but that heirs and devisees were equally the objects of the act's protection; and, in reannouncing this rule, there is no reason why it should not include the legatees of the proceeds of land sold after the liens of the debts of the de-

cedent upon it had expired; for if, as owners of the unconverted land, it could not be taken from them, they ought not, in reason, to be deprived of the proceeds of it when converted into money. As to the claims of the appellees upon their respective notes, we repeat what was said in Cake's Estate, 157 Pa. 457: "The insuperable difficulty, in the way of the rejected claims, is that they had ceased to be liens on the land, from the sale of which the fund in question was raised. Assuming them to have been valid claims against the estate of the intestate and therefore liens on the real estate of which he died seized, they were not liens thereon at the time the sale was ordered, and therefore not entitled to participate in the distribution."

What we have said as to the time when there was a conversion of the real estate of the testator, and as to the immunity of the proceeds of the sale of it from liability for his common debts, disposes of the questions raised by the five assignments of error. In the printed argument there appears a schedule of distribution, which we are asked to approve, but, instead of doing so, we reverse the decree below and remit the record, that the exceptions to the account of J. D. Cooper, executor of the last will and testament of Josiah K. Cooper, deceased, may be disposed of and distribution made in accordance with this opinion, the costs of this appeal to be paid out of the fund in the hands of the accountant.

Karl, Appellant, *v.* Juniata County.

Practice, C. P.—Appeals—Charge—Assignments of error.

A judgment on a verdict will not be reversed because of a detached portion of the charge alleged as error, where it appears that the portion of the charge complained of, taken in connection with instruction immediately preceding it, and other portions of the charge, could not have possibly been misunderstood by the jury.

Charge—Independent contractor—Illustration.

Where the court has given the jury a correct definition of an independent contractor, it can in nowise confuse or mislead the jury by giving an illustration as follows: "If the commissioners employ a tinner to roof

this courthouse making no provision as to how the old tin is to be removed or the new tin raised up and placed, and the commissioners are not present directing the operation or the manner of its performance and have relinquished their power over the work or manner of its performance and an accident befall an employee or other person, the county would in nowise be responsible for any act, negligent or otherwise, by the employer whereby some one is injured."

Charge—Points—Improper points.

A point is properly refused which assumes that the jury could have found facts of which there was no proof, and asks them to give undue effect to other facts.

Contract—Independent contractor.

The fact that the person alleged to be an independent contractor was employed at $2.00 per day and directed to employ other hands at $1.50 per day, is not necessarily inconsistent with the independent character of his employment.

Negligence—County—Repair of county bridge.

Where a county is about to repair a county bridge, it is not negligence per se to regularly and carefully pile plank on the bridge, leaving ample room for two two-horse teams to pass immediately opposite the pile, and leaving the pile there from the beginning of May 29, to remain over Decoration Day until the following morning May 31, if the plank is necessary for the repairs in hand.

Negligence—Counties—Bridge—Defective eyesight—Charge.

In an action against a county to recover damages for personal injuries sustained on a county bridge, where there is evidence that the eyesight of plantiff was defective, it is not improper for the court to affirm a point as follows: "That if the jury believe from the evidence that the eyesight of the plaintiff was impaired on the night of the accident, the law required a degree of care upon his part beyond the usual and ordinary, proportioned to the degree of his impairment of vision, and if he failed to exercise the proper degree of care under the circumstances, he was guilty of contributory negligence and the verdict must be for the defendant."

Argued May 27, 1903. Appeal, No. 27, Jan. T., 1903, by plantiff from judgment of C. P. Perry Co., Aug. T., 1901, No. 20, on verdict for defendant in case of John Karl v. Juniata County. Before MITCHELL, DEAN, FELL, BROWN and POTTER, JJ. Affirmed.

Trespass to recover damages for personal injuries. Before SHULL, P. J.

At the trial it appeared that about nine o'clock on the evening of May 30, 1900, plaintiff drove upon a county bridge over

Juniata river connecting the boroughs of Patterson and Mifflintown, and while he was on the bridge struck a pile of plank with the front wheel of his buggy, resulting in the injuries for which this suit was brought.

The court charged in part as follows:

You will observe that the physicians called upon the part of the plaintiff and defendant are rather far apart in their conclusion. This is a case in which when the doctors disagree you must decide who was in position best to know the facts through the early history of the diseases complained of in this case, to whom could he easiest feign, if he were disposed to feign, for both sides agree that it is of the character of diseases (so far as the principal feature among the things complained of in this case is concerned) in which patients malinger or simulate or feign an illness.

[The question now therefore naturally arises from all of the evidence, from what point of time does the sclerosis of arteries and heart trouble, its resultant cause, date, if before, then the accident could not be the cause and your only inquiry would be as to the extent of the exaggeration thereof and the pain at his shoulder which is assigned to anthritis occasioned by accident or from rheumatism aggravated somewhat by the injury.] [15]

[The next legal question to which I wish to direct your attention is the matter of independent employment, by which I mean was this repair carried on under the direction, control or supervision of the county commissioners, or was it done by James J. Horning, an independent contractor? Where a man employs another to work under his direction he is responsible for his acts. The employee becomes his agent or servant and the responsibility rests with the master who controls. On the other hand where one employs a mechanic or other person to perform a piece of work and does not undertake to direct how or in what manner it is to be done, but vests in the mechanic power to perform the work as he pleases and in his own way without direction, restraint or control of the superior or master, the employer is not responsible for the employee's negligence, if he be negligent.

This is an important problem in the consideration of this case, for much hangs thereby; perhaps a safe rule to govern

your finding would be this which is laid down by our Supreme Court, 86 Pa. 153: "If one renders service in the course of an occupation representing the will of his employer, only as to the results of his work, and not as to the means by which it is accomplished, it is an independent employment," and this rule prevails regardless of whether the employment is under a contract sum or by the day. If the commissioners employ a tinner to roof this courthouse making no provision as to how the old tin is to be removed or the new tin raised up and placed, and the Commissioners are not present directing the operation or the manner of its performance and have relinquished their power over the work or manner of its performance and an accident befall an employee or other person, the county of Perry would in nowise be responsible for any act, negligent or otherwise, by the employer, whereby some one is injured. This may seem to be a harsh rule that counties, townships, cities or boroughs may thus unload responsibilities on to some other persons who may be financially irresponsible, but such we say to you is the rule of law. The evidence you have and you will apply the rule of law thereto and if under the evidence you find that James J. Horning was under independent employment, this plaintiff cannot recover, and your verdict would be for the defendant.] [16]

Plaintiff presented, among others, the following point:

3. If the jury find that the county commissioners were accustomed to employ James J. Horning to make the ordinary repairs to said bridge; that on May 26, 1900, prior to the accident, they employed him at the usual wages of $2.00 per day to put new plank in the bridge, directing him to employ other hands at $1.50 per day each; that they instructed him to take out worn-out plank put in new ones until the supply of plank which commissioners then had on hand was exhausted; that they directed him to purchase the necessary spikes from Guss & Sieber; and paid them for a hammer and hammer handles which he purchased from them for use on the repairs and charged to the county; that they did not place the manner of the work entirely in the hands of Horning and beyond their own control, but could, if they had seen fit, have personally supervised and directed the work, without changing the terms of the contract; that no time was fixed for the completion of the work; that Horn-

ing and the men with him, at the direction or suggestion of the commissioners' clerk, cleared up the bridge on Tuesday night and did not work the following day, which was Decoration Day; that when the commissioners' supply of plank was exhausted they paid to Horning $2.00 per day for his labor and $1.50 per day for the other men, except the drayman, whom they paid directly; that Horning's bill when presented for payment was for so many days for himself at $2.00 per day and for the others at $1.50 and that the county commissioners in their annual statement took credit for the bill in an item reading, "J. J. Horning, labor, $16.50;" the jury may properly find that Horning was a servant or employee of the county and not an independent contractor. *Answer:* This is refused. [17]

Defendant presented these points:

4. The evidence in this case showing that at a point near the centre of the bridge during the repairing of the floor of the driveway, eighteen wide, plank were piled at the side of the driveway so as to extend a width of two plank, from eighteen inches to two feet into the driveway, that if the jury believe said plank were necessary for the repairs in hand and were piled regularly and carefully, leaving ample room for two two-horse teams to pass immediately opposite the pile of plank, from these facts negligence would not be imputed to the defendant county. *Answer:* This we affirm. [18]

5. The evidence in this case showing that at a point near the centre of the bridge, during the work of repairing the driveway, eighteen feet wide, plank were piled at the side of the drive-way so as to extend the width of two plank, from eighteen inches to two feet, into the driveway, that if the jury believe the said plank were necessary for the repairs in hand and were piled regularly and carefully, leaving ample room for two two-horse teams to pass immediately opposite the pile of plank and that it was not reasonably convenient and practicable to remove said plank off of said bridge, then the piling of said plank in said manner at time of quitting work on evening of May 29, 1900, and leaving them so remain over Decoration Day, May 30, 1900, and until the time of again commencing work of repair on morning of May 31, 1900, would not constitute negligence of itself. *Answer:* This is affirmed. [19]

8. That if the jury believe from the evidence that the eyesight of John Karl, the plaintiff, was impaired on the night

of the accident, the law required a degree of care upon his part beyond the usual and ordinary, proportioned to the degree of his impairment of visior and if he failed to exercise the proper degree of care under the circumstances he was guilty of contributory negligence and the verdict must be for the defendant. *Answer:* This is affirmed. [20]

Verdict and judgment for defendant. Plaintiff appealed.

Errors assigned were (1–14) various rulings on evidence; (15–20) above instructions, quoting them; (21) that the charge was unfair to the plaintiff.

James M. Barnett, of *Barnett & Son*, with him *Chas B. Crawford*, for appellant.

J. Howard Neely, with him *Wilberforce Schweyer*, county solicitor, and *W. N. Seibert*, for appellee.

Opinion by Mr. Justice Brown, July 9, 1903:

The first fourteen assignments of error in this case question the correctness of the trial judge's rulings in the admission, rejection and striking out of the evidence. We have examined each with care, but from none of them does it appear that substantial error was committed. All are overruled without comment, for no one of them requires from us a discussion of the rules of evidence or calls for our reasons in holding that they were not violated in the rulings complained of.

The brief extract from the charge which is the subject of the fifteenth assignment, standing alone, might justify the appellant's contention that the court had "ignored entirely the plaintiff's theory of the nature and cause of the injuries complained of, the theory presented being that of the defendant, viz: that the plaintiff's physical and mental troubles were due to sclerosis of the arteries and to heart trouble;" but, if read in connection with what immediately precedes it and other portions of the charge, it is manifest that what the court intended to say to the jury, and what they must have understood as having been said to them, was, that, if the plaintiff was suffering simply from sclerosis of the arteries and heart trouble, which had existed before the accident, then the only inquiry

would be as to the extent of its exaggeration of them. This was manifestly correct. Immediately before using the language objected to, the learned trial judge had called attention to the disagreement of the doctors as to what was the real cause of the physical troubles of which the plaintiff was complaining, and, in other portions of his charge, he had specifically referred to the testimony in support of plaintiff's theory that he was suffering from injuries caused by the accident. The doctors called by the plaintiff testified that he was suffering from traumatic neurosis, attributable to the accident; those called by the defendant said his troubles were sclerosis of the arteries and heart trouble, with which he had been affected before the accident. It is not possible that the jury could have understood the court, from what is embraced in the fifteenth assignment, as saying that the defendant's theory as to the cause of plaintiff's trouble was the true one, and the assignment complaining of this is overruled. It is perfectly clear that the learned judge was calling attention, in the first portion of the extract from his charge, simply to the defendant's theory of what was the matter with the plaintiff.

No exception is taken to the court's definition of an independent contractor. On the contrary, the appellant admits that he finds no fault with it, but insists that the average juryman could not understand it and that the illustration was misleading. In this we cannot concur, for it is not conceivable that the average juror could be so stupid as not to be able to comprehend the court's very clear definition of an independent contractor, or that the apt illustration used could have had any other effect than to make it perfectly plain what the court meant by the words "independent contractor."

Plaintiff's eighth point, as a whole, could not have been affirmed. It assumed that the jury could have found facts of which there was no proof, and it asked them to give undue effect to others. There was no testimony, by way of illustration, that the board of county commissioners, which had employed Horning to make the repairs on the bridge at the time of the accident, had ever employed him before; and yet the only question was as to the character of the employment in this particular instance. The character of his employment, or the number of times he had been employed by former

boards, was not in the case and could have thrown no light on the character of his employment to repair the bridge in May, 1900. Again, that he was employed at $2.00 per day and directed to employ other hands at $1.50 was not necessarily inconsistent with the independent character of his employment: Harrison v. Collins, 86 Pa. 153; and, from the court's affirmative answers to plaintiff's fourth and eighth points, the jury could have found what was asked for in the third. The sixteenth and seventeenth assignments are not sustained.

What the court said in its answers to defendant's fourth and fifth points was simply that it was not negligence per se to regularly and carefully pile the planks, leaving ample room for two two-horse teams to pass immediately opposite the pile, and leaving them there from the evening of May 29, 1900, to remain over Decoration Day until the following morning—May 31—if the said planks were necessary for the repairs in hand; for, as was said of the repair or construction of a highway in Keeley v. Shanley, 140 Pa. 213, in such a case "there must necessarily be inequalities, heaps of stone, and other materials upon the ground necessary for such operations."

As there was some testimony relating to the defective eyesight of the appellant, the twentieth assignment is overruled and, in passing to the twenty-first and last, we need only say that, taking the charge in connection with the answers of the court to plaintiff's first, second, fourth, fifth, sixth, seventh, eighth and tenth points, it is not so far open to the exception taken to it as to call for a reversal of the judgment.

Judgment affirmed.

Commonwealth, Appellant, *v.* Lehigh Coal & Navigation Company.

Taxation—Store orders—Statement of account—Act of June 24, 1901, *P. L.* 596.

A paper given by a coal company to an employee, in which the latter is credited with the full amount of wages earned, debited with amounts not due because already paid to him or upon his orders, and the balance shown which is due him, and is payable in money, is not an order upon which the company can be taxed under the Act of June 24, 1901, P. L. 596.

Argued June 1, 1903. Appeal, No. 4, May T., 1903, by plaintiff, from judgment of C. P. Dauphin Co., Commonwealth Docket, 1901, No. 131, for defendant in case of Commonwealth v. Lehigh Coal & Navigation Company. Before MITCHELL, DEAN, FELL, BROWN, MESTREZAT and POTTER, JJ. Affirmed.

Appeal from tax settlement.

SIMONTON, P. J., found the facts to be as follows:

1. On the semi-monthly pay day, which occurred July 10, 1901, the defendant gave to each of its employees a statement of the total amount of his earnings since the last preceding pay day, and an itemized statement of the deductions which defendant claimed his account was subject to for advances made since last pay day, either in cash directly to him or to others on his order, or for which the employee had become indebted to it for services rendered; and the balance shown by the statement to be due to each of the employees was on pay day paid to him in cash. The total amount of the earnings of all the employees for the pay period was $105,603.42; the amount of the deductions was $12,781.57, and the total amount of cash paid to the employees on pay day was $92,821.85.

2. Defendant under protest made the report prescribed by the Act of June 24, 1901, P. L. 596, and required by the auditor general on the blanks furnished by him, stating the total amount of earnings during the pay period, the items for which deductions were made, the amount deducted for each item, the total amount deducted, and the amount paid in cash to its em-

ployees. On this report the auditor general and state treasurer, on August 1, 1901, settled an account against defendant, charging it with a tax at the rate of twenty-five per cent on $7,784.52, the amount of the deductions less certain items in respect of which the auditor general decided that defendant was not liable to tax. From this account defendant appealed.

3. The deductions were made in respect of the following items: Hay, feed and mine supplies, beneficiary fund, hauling coal, water rent collections, store collections and miners' trains. All of these, with two exceptions, represented amounts that had been paid in cash by defendant before pay day to creditors of its employees at their request; the exceptions were a charge for hauling coal that had been sold by defendant to its employees, and a charge for the price of tickets sold by defendant to its employees for passage on its trains. There was no objection made by any employee to any of these deductions, but the balance stated to be due to each was paid to him during the pay period.

4. Defendant does not own nor conduct, and is not in any way interested in any store, and did not, for the period for which the tax is claimed, give, make or issue to any employee any order on any store or storekeeper, or on any other person, either for payment of labor or otherwise.

The court entered judgment for defendant.

Error assigned was in entering judgment for defendant.

M. J. Martin, with him *Frederic W. Fleitz*, deputy attorney general, and *Hampton L. Carson*, attorney general, for appellant.

M. E. Olmstead and *A. C. Stamm*, for appellee.

PER CURIAM, July 9, 1903:

The Act of June 24, 1901, P. L. 596, provides that "every person, firm, partnership, corporation or association" shall make report to the auditor general "of the number and amount of all orders, checks, dividers, coupons, pass books, and all other books and papers, representing the amount, in part or whole, of the wages or earnings of an employee that was given, made or issued by him, them or it for payment of labor, and not re-

deemed by the said person, firm, partnership, corporation, or association, giving, making or issuing the same, by paying to the employee or a member of his family the full face value of said order, check, divider, coupon, pass book, or other paper representing an amount due for wages or earnings, in lawful money of the United States, within thirty days from the giving, making or issuing thereof" and imposes a tax upon all such orders.

The facts found by the learned judge below, and not excepted to by the commonwealth, demonstrate that the act has no application in the present case. The orders, etc., specified in the act are orders "given, made or issued by him, them or it" that is by the person, firm, partnership, corporation or association previously mentioned, "for payment of labor," in other words orders, coupons, pass books, etc., popularly known as store orders given by the employer to the employees as payment in place of money..

The papers claimed by the commonwealth to be taxable in this case are not orders in place of money at all, but mere statements of account between the appellee and its employee, in which he is credited with the full amount of wages earned, debited with amounts not due because already paid to him or upon his orders, and the balance shown which is due him and is payable in money. It is no different in intention or legal effect from a bank's settlement of a depositor's deposit book, showing the amount of his deposits, the payments already made by his order on his checks, and the balance presently due him. The statements of the corporation in this case have neither the form nor the substance of the store orders which the statute subjects to tax. And to show the inapplicability of the tax in fact, the court has found specifically that the company appellee "does not own nor conduct and is not in any way interested in any store, and did not for the period for which the tax is claimed, give, make, or issue to any employee any order on any store or storekeeper, or on any other person, either for payment of labor or otherwise."

Judgment affirmed.

Williams *v.* Williams.

Partnership—Evidence—Loan.

In an action for money loaned, the defense that plaintiff was a partner was met by plaintiff's evidence, that although he had bought an interest in a business of defendant, he had never received such interest, and had revoked the agreement. This presented only a question of fact for the jury.

Argued Feb. 16, 1903. Appeal, No. 203, Jan. T., 1902, by plaintiff, from judgment of C. P., Schuylkill Co., March T., 1901, No. 173, on verdict for defendant in case of John J. Williams v. Henry L. Williams. Before MITCHELL, DEAN, FELL, BROWN, MESTREZAT and POTTER, JJ. Affirmed.

Assumpsit for money loaned. Before BECHTEL, P. J.

Verdict and judgment for defendants. Plaintiff appealed.

Errors assigned were various instructions.

George M. Roads, with him *R. H. Koch*, for appellant.

E. D. Smith, *Arthur J. Pilgram*, and *John F. Whalen*, for appellee, were not heard.

PER CURIAM, May 11, 1903:

Appellant sued as a creditor for money loaned; the defense was that he was a partner. It was not disputed by appellant that he had paid in the money, in pursuance of an agreement for the purchase of an interest in the business, but he claimed that the interest had not in fact been given to him and that he had thereupon rescinded the agreement. This was the whole issue in the case and on it the jury found for defendant. We see no error in the mode of submission and there is nothing else in the case.

Judgment affirmed.

Commonwealth v. Delaware, Lackawanna & Western Railroad Company, Appellant.

Taxation—Capital stock of corporation—Coal on hand—Mining companies.

The value of coal which a Pennsylvania mining corporation has on hand in other states, and which it has shipped to such other states for the purpose of sale, and not to serve any permanent corporate purpose, cannot be deducted in determining the value of the capital stock of such corporation for the purpose of taxation; and it is immaterial that taxes were assessed and paid on the coal in the states where it was stored awaiting sale, if it does not appear whether such taxes were paid for state, local or municipal purposes, and it appears that they were paid without contest.

Argued June 1, 1903. Appeal, No. 18, May T., 1901, by defendant, from judgment of C. P. Dauphin Co., Commonwealth Docket, 1900, No. 213, for plaintiff on case tried by court without a jury in suit of Commonwealth v. Delaware, Lackawanna & Western Railroad Company. Before MITCHELL, DEAN, FELL, BROWN, MESTREZAT and POTTER, JJ. Affirmed.

Appeal from tax settlement.

WEISS, J., found the facts among others as follows:

4. The facts agreed upon by counsel for the commonwealth and the company are set forth in the affidavits of W. H. Truesdale, president, and Fred. F. Chambers, the secretary and treasurer of the company, and, in so far as they relate to the reserved question, are as follows, viz:

"Under powers conferred by special charter previous to the adoption of the present constitution of Pennsylvania, the Delaware, Lackawanna and Western Railroad Company is largely engaged in the mining and purchasing of anthracite coal in Pennsylvania, nearly all of which coal it transports to points without said state and there sells. By far the greater part of this coal is transported from the mines for immediate delivery at points in other states, and is not kept or held in stock in said other states longer than is necessary for the purpose of transferring possession from this company to the purchasers; but at certain points in other states, as, for instance, at Buffalo, N. Y., and at Chicago, Ill., the company keeps constantly on

hand a stock of coal for purposes of sale, the same being stored in yards or upon docks maintained by the company for that purpose. The coal thus on hand awaiting sale between the first and fifteenth days of November, 1899, the date when the company's capital stock is required by law to be appraised for taxation, was of the value of not less than $1,702,443, and was included in the valuation of the company's capital stock upon which tax was charged in the auditor general's account. The coal thus on hand at that date was approximately the amount usually kept in stock at such points. The said coal when shipped from Pennsylvania was destined to said points in other states, with no intention of ever returning the same to Pennsylvania. On the contrary, said coal was intended to, and did, become part of the general mass of property in said other states, and the company is there annually taxed upon or in respect to the same, and was so taxed for 1899. When the coal thus kept in stock in the states of New York, Illinois, and other states outside of Pennsylvania is sold, the proceeds are returned to the company's treasury in the city and state of New York.

"In 1899 the company sold and delivered coal at points outside of the state of Pennsylvania of the aggregate value of not less than $18,587,258, but this was either contracted for before it left the mines or delivered upon, or within a comparatively short time after its arrival at the points in other states to which it was to be delivered. What I have said above was with reference only to coal kept in stock at points outside of Pennsylvania for purposes of sale."

5. The corporation defendant is authorized by law to transact business and to hold lands in other states for depot, wharfage and coal yard accommodations and to make such agreements and contracts with corporations and individuals of other states as may be necessary and expedient for the transporting and vending of coal mined and purchased by it, and defendant is also authorized to have and maintain its general office and place of business and to hold its stockholders' meeting, in the state of New York, and to have as president, directors and other officers, nonresidents of the state of Pennsylvania. The company is taxable upon the value of the property represented by its capital stock, and not upon the amount of the latter.

Being a tax on property it follows that the state cannot tax

that part or portion of its property, which is permanently located beyond her territorial limits, of which is "intended permanently to serve any corporate purpose of its owner."

The coal was here as real estate, until it was mined. It became, and remained, personal property from that time. As such it entered into the value of capital stock. It was transported to points in other states for temporary storage and immediate sale. It is not a thing used in the prosecution of the business of the company. It serves no corporate purpose. It is a commodity dealt in by the company. The product which is taken out of the earth in this state, and which, as such, entered into the measure and determination of the value of the company's property for taxable purposes, is removed out of the state for the sole purpose of a ready sale. It may be, and doubtless was, transported from there to other states and places after it was sold. But wherever sold, the proceeds eventually came back to the state from whence the mined product was shipped for the purpose of sale, and where its officers and treasurer, in contemplation of law, reside.

The coal was taken from its taxable habitat, imbued with the nomadic instinct, ordained to wander far and wide through other states seeking and finding a commercial mart, and, in its changed form, sent on the pilgrimage back to its original domicile.

It is this itinerant trait which likens the case to the dredges, tugs and scows in Commonwealth v. American Dredging Co., 122 Pa. 386, employed beyond, but taxed within, the boundaries of this state, and subjects the coal to taxation in the parent jurisdiction, from whence it ought to go exempt from the imposition of further burdens elsewhere for state purposes for the year specified.

That cannot be said to be permanent or have fixity which is voyaged from place to place for a market. Horses, cattle and other movable chattels, when transported to another jurisdiction, are ordinarily kept and used there for some purpose attendant upon the pursuit or business of the owner. They may with propriety be said to be located there permanently.

But coal mined or unmined, as well as the proceeds of the sale of the product, are protected by the laws of this state, and must accordingly respond to the burden of taxation in this state. Protection and taxation are correlated.

It is testified to and not contradicted, that the coal for the tax year 1899 was intended to, and did become, part of the general mass of property in the other states, "and the property is there annually taxed upon, or in respect of, the same, and was so taxed in 1899."

All taxes assessed against the company for 1899 in other states on coal located there have been paid, according to what the secretary of the company says he believes, and so far as he can now recall, but it does not appear that said taxes were not for local or municipal purposes and not for state purposes, and it does appear that the taxes laid were paid without contest.

The company may thrive better by resisting the collection of a tax on coal in those states into which it has been shipped than here, where the property in question is accorded protection, and where it enters into the value of the capital stock, and is primarily taxable.

Taxation there would not suspend the right to tax property located here and forming part of a mass which, as well before severance from the land as after, and, of course, prior to its transportation elsewhere, entered into and affected the value of the capital stock, and which was so deposited elsewhere, for a mere temporary and not a permanent purpose. Primary jurisdiction to tax the coal attached here and its voluntary carriage into other states for sale, does not detach it, even if by law of those states it is again taxable there.

What the Supreme Court in Brown v. Houston, 114 U. S. 622 (5 Sup. Ct. Repr. 1091), decided, as we understand it, is, that a tax laid by the state of Louisiana, pursuant to a general law, upon coal transported into that state from Pennsylvania, where a tax was theretofore laid upon capital stock representing the same property and paid for the same year, was not violative of the provisions of the constitution of the United States relative to duties on imports or exports and regulating commerce among the several states.

Mr. Justice BRADLEY, p. 623, says: "It was not a tax imposed upon the coal as a foreign product, or as the product of another state than Louisiana, nor a tax imposed by reason of the coal being imported or brought into Louisiana, nor a tax imposed whilst it was in a state of transit through that state to some other place of destination, and was put up for sale."

It was "an exercise of local administration under the general taxing power, which, though it may incidentally affect the subjects of commerce, is entirely within the power of the state until congress shall see fit to interfere and make express regulations on the subject."

There was no assessment of a tax upon the real estate lying beyond the limits of the state, upon which the coal was placed, because it was permanently located beyond the taxing jurisdiction of the commonwealth, and never subject to the visatorial power of the auditor general or any other authority.

But the dismantling of real estate situate in this state, and the transportation of the severed fragments into other states for the avowed purpose of sale, even though placed there before the actual valuation and assessment was paid thereon, is quite a different proposition.

The company is required not only to estimate and appraise its capital stock at its actual value in cash between the first and fifteenth days of November of each year, but it must be not less "than the average price the said stock sold for during the year ending with the first Monday of November," 1899, "and not less than the price or value indicated or measured by net earnings or by the amount of profit made and either declared in dividends or carried into surplus or sinking fund."

After it leaves the parent ledge or vein, it is a constantly moving commodity, never the same in quantity or identity during any week, month, year, or years, going to its dumping pile to-day, departing, to-morrow—fugitive ever until it reaches the torch.

By the comity which obtains among the several states and which has the force and sanction of law, property situate as this is, ought to be taxed by the sovereign in whose domain it is produced, and who granted the franchise to produce it; and the product transported for sale to other states ought to be exempt from further taxation there for state purposes.

This rule is also in accord with the dictates of equity, for by it the value of the product as represented by the capital stock can be ascertained with almost mathematical exactness.

In Commonwealth v. Delaware, etc., Railroad Co. 145 Pa. 96, the Supreme Court, commenting upon the case of Commonwealth v. American Dredging Company, 122 Pa. 386, says:

"The dredges which were the subjects of the controversy were taxable at the situs of the company, for the reason that, although wholly used outside of the commonwealth, they did not remain in any one place long enough to render them liable to taxation there."

Having reached the conclusion that the shipment of the coal into other states for the purpose of sale does not give it the character of permanence there, so as to exempt it from taxation here, and being also of the opinion that even if the testimony had actually disclosed the fact that the coal shipped into the other states was taxed for the same year prior to its disposition and the tax paid by the company, it would still be taxable by this state, there remains only the duty to direct judgment to be entered upon the reserved question in favor of the commonwealth and against the defendant company.

Error assigned was in entering judgment for plaintiff.

M. E. Olmsted, with him *A. C. Stamm*, for appellant.—The coal in question had clearly become part of the general mass of property of the states in which it was located and stored awaiting sale, and to whose residents it has since been sold. It was therefore clearly not taxable in Pennsylvania. The same property could not be taxable in two states at the same time. This property in other states was, as is shown by the evidence, included in the valuation of appellant's capital stock upon which a tax is charged in the account appealed from. It was not within the intention nor the power of the legislature to tax capital stock thus representing property outside the limits of the state: Com. v. Standard Oil Co., 101 Pa. 119; Com. v. American Dredging Co., 122 Pa. 386; Com. v. Montgomery Lead & Zinc Mining Co., 5 Pa. C. C. Rep. 89; Com. v. Penna. Coal Co., affirmed by the Supreme Court October, 1884, and not reported in state reports, but found in note to Com. v. Montgomery Lead & Zinc Mining Co., supra; Com. v. D. L. & W. R. R. Co., 145 Pa. 96.

Hampton L. Carson, attorney general, with him *Frederic W. Fleitz*, deputy attorney general, for appellee.—This case is ruled by Commonwealth v. Pennsylvania Coal Company, 197 Pa. 551.

Opinion by Mr. Justice Brown, July 9, 1903:

This case is not distinguishable from Commonwealth v. Penna. Coal Co., 197 Pa. 551, and is controlled by it. Our attention is called to the fact that, in the present case, taxes were assessed and paid in the states where the coal was stored awaiting sale, and we are asked to regard the payment of those taxes as creating a distinction between the two cases. A sufficient answer to this is the court's finding that it does not appear whether they were paid for state, local or municipal purposes; and it appears they were paid without contest.

One of the branches of this appellant's business is the mining and sale of coal. To enable it to sell this commodity in other states, some of its tangible property must be permanently in them, and so much as is so located and permanently serves the corporate purpose of the company, which is the sale of its coal, is not taxable here. But the coal itself is not such exempted property. As soon as it is mined here it enters into the value of the company's capital stock, upon the actual value of which the commonwealth is entitled to her tax. When shipped out of the state it is for the purpose of sale, and not for permanent storage. As fast as it is received at the wharves and in the yards, the company aims to turn it into money, which will pass at once into its treasury. "It is not a thing," as the learned judge below very properly said, "used in the prosecution of the business of the company." The business is prosecuted that the coal may be sold, and the exemption from taxation does not extend to the commodity itself, but is confined to such of the corporate property as must be used outside of the state to enable the company to conduct its business. This is the limit of exemption from taxation here, and the appellant's coal shipped to other states for sale was properly taxed by the commonwealth's officers.

Judgment affirmed.

INDEX.

ACCORD AND SATISFACTION.

1. *Contract—Estoppel—Assumption of debts of another—Receipt.* **Ebert v. Jones,** 395.

2. *Payment before debt is due.* **Weiss v. Marks,** 513.

ACCOUNTS.

1. *Audit—Municipalities — Philadelphia — Public officers — Act of June* 1, 1885. **Com. v. Patterson,** 522.

2. *Equity—Joint owners of tugboat—Managing owner—Salary as such.* **Croasdale v. Von Boyneburgk,** 15.

3. *Orphans' court practice.* **Sherwood's Est.,** 465.

4. *Partnership—Dissolution.* **Brew v. Hastings,** 155.

5. *Settlement of—Partnership—Interest.* **Kelley v. Shay,** 215.

6. *Statement of—Taxation—Store orders—Act of June* 24, 1901, *P. L.* 596. **Com. v. Lehigh Coal & Nav. Co.,** 641.

ACTIONS.

1. *Insurance — Fire insurance — Cancelation — Contract — Parties.* **Baldwin v. Penna. Fire Ins. Co.,** 248.

2. *Joint action—Partnership—Parties—Res adjudicata—Judgment.* **McFarlane v. Kipp,** 317.

3. *Lunacy — Committee — Sale of personal property — Trespass.* **Spaulding v. Bullock,** 224.

4. *Negligence—Joint tort feasors.* **Goodman v. Coal Twp.,** 621.

5. *Partnership—Suits—Breach of contract—Assumpsit.* **McCollum v. Carlucci,** 312.

6. *Promissory notes—Notes held as collateral.* **Willey v. Browne,** 322.

AFFIDAVIT OF DEFENSE, see Practice, C. P.

AFFIDAVIT OF DEFENSE.

1. *By executor—Rules of court.* **Helffrich v. Greenberg,** 516.

2. *History of—Function of affidavit—Supplemental affidavit—Practice, C. P. — Corporation — Officer—Contract — Set-off — Discretion of court—Allowance.* **Andrews v. Blue Ridge Packing Co.,** 370.

ALLEGATA AND PROBATA.

1. *Negligence—Joint tort feasors—Action.* **Goodman v. Coal Twp.,** 621.

AMENDMENTS.

1. *Practice, C. P.—Parties—Statute of limitations.* **Wright v. Eureka Tempered Copper Co.,** 274.

2. *Practice, C. P.—Pleading—Statute of limitations.* **Barclay v. Barclay,** 307.

3. *Slander—Actionable words—"Damned bitch"—Innuendo.* **Stoner v. Erisman,** 600.

APPEALS.

1. *Assignments of error—Equity—Exceptions.* The appellate court will not consider a question which was not included in or alluded to in any finding of fact or of law by the trial court, not made the subject of any exception, nor set forth in any specification of error. **Phila. & Tren. R. R. Co. v. Neshaminy Elev. Ry. Co.,** 343.

2. *Assignments of error—Evidence.* A judgment will not be reversed because of the exclusion of certain testimony where the party is subsequently permitted to testify to substantially the same allegations as those contained in the rejected offers. **Fitzpatrick v. Union Trac. Co.,** 335.

3. *Assignments of error—Findings of fact and law.* An assignment of error which includes the rulings of the judge below on a large number of different requests for findings of fact and law is in total violation of the rules of court, and will not be considered. **Kase v. Burnham,** 330.

4. *Assignments of error—Partition—Exceptions.* On an appeal from a decree in partition an objection to the manner in which the bidding was conducted will not be considered by the appellate court, where such objection was not raised by the exceptions to the master's report nor by the assignments of error to the order of the court. **Black v. Black,** 116.

5. *Assignments of error—Practice, Supreme Court.* It is improper practice on appeal to raise the same question by several different assignments of error. **Seifred v. Penna. R. R. Co.,** 399.

6. *Certiorari—Review—Municipalities—Act of March* 31, 1864, *P. L.* 162. On an appeal in the nature of a certiorari from an order of the court of quarter sessions made under the Act of March 31, 1864, P. L. 162, relating to the collection of district and township debts, nothing is brought up for review by the Superior Court except the regularity of the proceedings in the court below. If no irregularity is disclosed in the proceedings the appeal should be dismissed without considering any other question. **Plains Township's Appeal,** 556.

7. *Charge—Exceptions—Quashing appeal.* An appeal will be quashed where the only errors assigned are to the charge of the court, and it appears that no exception was taken to the charge at the trial. **McConnell v. Penna. R. R. Co.,** 370.

8. *Equity—Findings of fact—Review.* **Watkins v. Hughes,** 526.

9. *Equity practice—Exceptions to decree nisi—Filing exceptions nunc pro tunc.* **Hinnershitz v. United Traction Co.,** 91.

10. *Final decree—Interlocutory decree—Quashing appeal.* An order directing a decree to be prepared in accordance with the findings of

APPEALS—*continued.*

the trial judge in an equity suit, is not a final decree from which a decree may be taken.

The Supreme Court will not proceed even with the consent of the parties, in cases where no judgment or decree has been entered by the court below. **Watkins v. Hughes,** 526.

11. *Findings of fact—Evidence.* A finding of fact in the court below as to the existence or nonexistence of a partnership, based upon sufficient evidence, will not be reversed by the Supreme Court in the absence of manifest error. **Kelley v. Shay,** 215.

12. *Judgment—Opening judgment—Evidence.* **Lauer Brewing Co., Ltd., v. Chmielewski,** 90.

13. *Opening judgment—Evidence.* **Lauer Brewing Co., Ltd., v. Chmielewski,** 90.

14. *Orphans' court practice—Bill of review.* **Sherwood's Est.,** 465.

15. *Practice, C. P.—Charge—Assignments of error.* **Karl v. Juniata Co.,** 633.

16. *Practice, C. P.—Trial.* **Kuntz v. N. Y. C. & St. L. R. R. Co.,** 162.

17. *Practice, Supreme Court—Interlocutory order—Scire facias sur municipal claim—Act of June* 4, 1901, *P. L.* 364. Where in a proceeding on a scire facias sur municipal claim under the Act of June 4, 1901, P. L. 364, an affidavit of defense is filed and the plaintiff files a replication to it, in pursuance of a rule, and the defendant then moves for judgment on the whole record, which motion the court dismisses, the order dismissing the motion is interlocutory and no appeal lies from it. **Phila. v. Pemberton,** 73.

18. *Statement of question and issue—Escheator's compensation and counsel fee.* The Supreme Court will not consider the question of compensation and counsel fee of a deputy escheator of the commonwealth where no such question was raised in the court below, and is not included in the statement, in the appellant's paper-book, of the question involved in the case. **Bousquet's Est.,** 534.

ARCHITECTS.

1. *Contract—Course of business—Contractor.* **McCaul's Est.,** 506.

ASSIGNMENTS OF ERROR.

1. *Appeals—Equity—Exceptions.* **Phila. & Tren. R. R. Co. v. Neshaminy Elev. Ry. Co.,** 343.

2. *Appeals—Evidence.* **Fitzpatrick v. Union Trac. Co.,** 335.

3. *Appeals—Findings of fact and law.* **Kase v. Burnham,** 330.

4. *Appeals—Partition—Exceptions.* **Black v. Black,** 116.

5. *Appeals—Practice, Supreme Court.* **Seifred v. Penna. R. R. Co.,** 399.

6. *Practice, C. P.—Appeals—Charge.* **Karl v. Juniata Co.,** 633.

7. *Practice, Supreme Court—Rule* 11 *and Equity Rule* 92. **Croasdale v. Von Boyneburgk,** 15.

ASSUMPSIT, see Actions.

ATTACHMENT EXECUTION.

1. *Legacy—Decedent's estates—Acts of April* 13, 1843, *P. L.* 233, *and April* 10, 1849, *P. L.* 619—*Trusts and trustees—Spendthrift trust—Charity—Intestacy—Execution.* Where a testator leaves his estate under a spendthrift trust for his three sons, with survivorship amongst themselves, and upon the death of the survivor to a charity, and directs his executors to sell all of his estate and the testator dies within thirty days from the date of his will, and the charitable bequest thereby fails, an attaching creditor of one of the sons all being alive has no right to issue a fieri facias on his judgment and sell the undetermined and unascertained interest of one of the sons in the estate of the testator which accrued to him by the failure of the charitable bequest. In such a case the attaching creditor after he has secured his judgment against the garnishees, must pursue his remedy in the orphans' court. No writ of fieri facias or other writ of execution is necessary to carry into effect the purpose of the attachment and to make it available to the creditor. **Ellwanger v. Moore,** 234.

ATTORNEYS AT LAW.

1. *Agreement of attorneys—Practice, C. P.—Rules of court.* **Black v. Black,** 116.

2. *Counsel fees—Remedy at law.* An attorney at law has a lien, or rather a right of defalcation on money or papers of his client while they are in his hands; but in a common-law action he has no such right of lien on his client's money in the hands of third persons, or upon a fund brought into court for distribution.

Where a suit in equity is brought to recover certain bonds, but an amicable agreement is reached, by which the bonds are to be returned, the attorney for plaintiff, although having rendered valuable services to the plaintiff, has no lien upon the bonds, and if at the attorney's instance the defendant deposits certain of the bonds with the prothonotary, the court has no jurisdiction to appoint an auditor to determine the amount of the attorney's fee, and to order that such fee when ascertained shall be paid out of the bonds deposited by leave of court. In such a case the attorney has a complete and adequate remedy at law, which he must pursue. **Quakertown & Eastern R. R. Co. v. Guarantors' Liability Indem. Co.,** 350.

3. *Witness—Evidence—Confidential communication.* The mere fact that a person is an attorney at law does not render him incompetent to testify as to matters affecting his client, except as to confidential communications.

The mere fact of employment of an attorney is not a confidential or privileged communication. **Sargent v. Johns,** 386.

AUDITOR.

1. *Finding of fact—Mistake of fact—Review.* An auditor's finding of fact confirmed by the court below that a mistake of fact was not proven, will not be reversed by the appellate court in the absence of manifest error. **Ridgway's Account,** 587.

BANKS AND BANKING.

1. *Checks—Certified checks.* A check by a depositor on his account certified by the bank becomes an obligation of the bank to the payee or holder, and in the absence of fraud or similar exceptional circumstances the amount is as much withdrawn from the depositor's account as if the money had been paid over the counter. **Central Guarantee Tr. & S. D. Co. v. White,** 611.

2. *Checks—Forgery—Indorsement.* One who has paid a check to one holding under a forged indorsement may recover back the amount if he proceeds with due diligence.

A beneficial association drew a check on a bank payable to the order of a brother of a beneficiary. The brother's name was forged upon the back of the check. The forged indorsement was followed by another indorsement, and the last indorsement, that of a trust company, expressly guaranteed the previous indorsements. The check was drawn upon a bank which was the depository of the beneficial association. The check was paid. Subsequently on discovery of the forgery, the bank demanded the money back from the trust company, and upon the latter's refusal to pay, brought suit. The trust company filed an affidavit of defense alleging that the check had been drawn by the beneficial association without proper precaution, inasmuch as the beneficiary was still alive. It then imputed this negligence to the bank as depository of the association. *Held*, that the affidavit of defense was insufficient to prevent judgment. **Second Nat. Bank v. Guarantee Tr. & S. D. Co.,** 616.

3. *Principal and agent—National bank—Dealing in stocks—Notice.* **Nat. Bank of Boyertown v. Fridenberg,** 243.

BENEFICIAL ASSOCIATIONS.

1. *Act of April* 6, 1893, *P. L.* 7*—Person entitled to fund—Sister—Friend.* A member of an unincorporated beneficial association named his wife as beneficiary in the certificate and she so remained for eighteen years when she died. At the time when the contract was made with the association a member had a right to change the beneficiary and designate another. After the death of his wife the member substituted the name of a person described as his "nearest friend" as beneficiary. The change was made in accordance with the rules of the order and was approved by its officers. On the death of the member his sister claimed the proceeds of the certificate as his only surviving heir at law. *Held*, that she was not entitled to the fund and that it was payable to the person whose name had been substituted in the certificate. **Schoales v. Order of Sparta,** 11.

2. *Beneficiary—Act of April* 6, 1893, *P. L.* 7*—Act prospective not retrospective.* The Act of April 6, 1893, P. L. 7, limiting the payment of death benefits by beneficial societies to "families, heirs, blood relatives, affianced husband or affianced wife of, or to persons dependent upon the member," is prospective in its operation and not retrospective and does not affect the rights of holders of certificates issued prior to that time. **Schoales v. Order of Sparta,** 11.

3. *Certificates—Beneficiary—Heir at law—Title to fund.* The heir

BENEFICIAL ASSOCIATIONS—*continued.*

at law of the holder of a death certificate in a beneficial society, is without standing to question the designation of a beneficiary by the deceased, notwithstanding she is within a class from which the member might have made his selection under the act of April 6, 1893. **Schoales v. Order of Sparta,** 11.

BILLS OF EXCHANGE.

1. *Presentation—Delay—Negligence—Acceptance of notes—Lunacy.* In an action against the administrator of the drawer of an order, it appeared that the plaintiff did not present the order to the drawee for some weeks, and that when he did so the drawees accepted it, but provided that it should not be paid until after the completion of a certain contract. The drawer wrote to the plaintiff suggesting that he should take notes from the drawee instead of relying upon the acceptance of the order. The plaintiff took the notes, which were never paid. There was evidence that the drawees were in failing circumstances during the whole course of the transaction, but the evidence was not definite as to whether the plaintiff knew this. There was also evidence that the drawer was insane at the time he wrote the letter to the plaintiff, but there was no evidence that plaintiff knew this. The court charged that plaintiff was bound to present the order "in what a prudent business man of reasonable intelligence would say was a reasonable time," and left the question of reasonable time to the jury. *Held*, that the instruction was proper. **Aspinall v. Viney,** 383.

BONDS.

1. *Ownership of—Corporations—Evidence—Equity.* **Kase v. Burnham,** 330.

2. *Subcontractors' bonds — Municipalities — Waiver — Evidence.* **Phila. v. Neill,** 333.

BOROUGHS.

1. *Malicious prosecution—Arrest without information.* **Kossouf v. Knarr,** 146.

2. *Ordinance—Resolution—Electric lighting—Electric light company —Contract—Estoppel.* Where an electric light company makes an offer to a borough for the public lighting, stipulating the time within which the offer is to be accepted, and the borough accepts the offer before the expiration of the time specified, and thereafter the company takes certain steps as if to carry out the contract, the company is bound by a valid contract with the borough, and it is immaterial that the borough between the date of the offer and the time of the acceptance advertised and received bids for the public lighting.

If an ordinance of a borough authorizes the borough council to make contracts for the lighting of the borough, the action of council in accepting a bid is merely ministerial, and not such an enactment, regulation, general law or ordinance as must be recorded in the borough ordinance book and advertised under the Act of April 3,

BOROUGHS—*continued.*

1851, P. L. 320, or the Act of May 23, 1893, P. L. 113. If objection is made that the resolution accepting the bid was not valid because there was no ordinance authorizing the contract, the burden is upon the person making the objection to prove the nonexistence of the ordinance.

Where a resolution of a borough council accepting the bid of an electric light company contemplates the execution of a formal contract, and the company sends a form of agreement acceptable to the borough solicitor, and the latter promptly prepares the agreement as desired by the company and delivers it to the general manager of the company, the agreement is binding upon the company, although not executed by it. **Lansdowne v. Citizens Elec. Lt. & Power Co.,** 188.

3. *Street railways—Contract—Performance—Impossibility of performance.* **Montooth Boro. v. Brownsville Ave. St. Ry. Co.,** 338.

4. *Street railways—Municipal consent—Condition—Guard wires.* **Conshohocken Boro. v. Conshohocken Ry. Co.,** 75.

5. *Water companies—Contracts—Constitutional law—Title of statute—Waterworks—Act of May* 3, 1901, *P. L.* 140. **Potter Co. Water Co. v. Austin Boro.,** 297.

BRIDGES.

1. *Negligence—Railroad—Province of court and jury.* **Sutliff v. Penna. R. R. Co.,** 267.

2. *Repair of bridges—Counties—Townships—Acts of April* 13, 1843, *P. L.* 221, *March* 30, 1859, *P. L.* 309, *and March* 12, 1860, *P. L.* 144. The special Act of March 30, 1859, P. L. 309, extended by the Act of March 12, 1860, P. L. 144, to Lycoming county, makes it the duty of supervisors and street commissioners in that county to keep in repair all bridges built by the county.

Township supervisors are not agents of the county commissioners in making repairs to a county bridge, and the duty of repairing and consequently of inspecting is primarily on the township. **Smith v. Muncy Creek Twp.,** 7.

3. *Repair of county bridge—Negligence—County—Defective eyesight—Charge.* **Karl v. Juniata Co.,** 633.

BUILDING LAWS.

1. *Municipalities—Fire ordinance—Wooden buildings—Reconstruction.* **Contas v. Bradford,** 291.

2. *Statutes—Repugnant proviso—Collateral support—Act of June* 8, 1893, *sec.* 8, *P. L.* 360—*Philadelphia.* **Wadasz v. Arcade Real Est. Co.,** 539.

BY-LAWS.

1. *Amendment of—Voluntary association—Vested right—Pilot's association.* **Marshall v. Pilot's Assn.,** 182.

CAUSE OF ACTION.

1. *Equity practice—Joint bill.* **Coatesville & Downingtown St. Ry. Co. v. West Chester Ry. Co.,** 40.

CERTIORARI.

1. *Appeals—Review—Municipalities—Act of March* 31, 1864, *P. L.* 162. **Plains Township's Appeal,** 556.

CHARITIES.

1. *Attachment execution—Legacy—Decedent's estates—Acts of April* 13, 1843, *P. L.* 233, *and April* 10, 1849, *P. L.* 619—*Trusts and trustees—Spendthrift trust—Intestacy—Execution.* **Ellwanger v. Moore,** 234.

2. *Devises to religious and charitable uses—Will—Execution—Witnesses—Act of April* 26, 1855, *P. L.* 328. **Irvine's Est.,** 1.

CHARTERS.

1. *Special charter—Street railways—Duty to repave streets—Act of April* 15, 1863, *P. L.* (1864) 1080. **Williamsport v. Williamsport Pass. Ry. Co.,** 65.

CHECKS.

1. *Banks and banking—Certified checks—Signing of check—Evidence—Province of court and jury.* **Central Guarantee Tr. & S. D. Co. v. White,** 611.

2. *Banks and banking—Forgery—Indorsement.* **Second Nat. Bank v. Guarantee Tr. & S. D. Co.,** 616.

CHURCH LAW.

1. *Ecclesiastical organization—Church government—Independent organization.* Whenever a church or religious society has been originally endowed in connection with or subordination to some ecclesiastical organization and form of church government, it can no more unite with some other organization or become independent, than it can renounce its faith or doctrine, and adopt others. **Thaddeus Dochkus v. Lithuanian Ben. Soc. of St. Anthony,** 25.

2. *Presbyterian church—Title to property—Trustees—Session.* In the Presbyterian church the legal title to church property is vested in the trustees of the congregation and not in the session. The function of the session is to exercise control over the spiritual affairs of the congregation, but not over its temporalities. The custody and care of the property pertain to the trustees, for the uses and purposes for which they hold the trust. Chief among these is the maintenance of public worship by the congregation; and in so far as that purpose is concerned, the trustees should respect the wishes and action of the session as to the use and occupation of the house of worship.

In the Presbyterian church a presbytery regularly convened at a stated meeting has the constitutional right to direct elders to cease acting without citing them to appear and to be heard in their own behalf.

A meeting of a session for the election of elders is invalid where the pastor of the church was not present, and no one was appointed by him to preside. Such a meeting cannot invalidate the regular annual elections held at the proper time and place called and conducted according to the custom of the congregation. **Dayton v. Carter,** 491.

CHURCH LAW—*continued.*

3. *Roman Catholic Church—Independent congregation—Title to real estate.* Church congregations may hold catholic doctrines just as other denominations hold catholic doctrines, but ecclesiastically and in sight of the Roman Catholic Church, may have no existence and not be recognized by the papal authority.

Where a congregation worships according to the forms and rites of the Roman Catholic Church, but it is denied that it adheres to and is connected with the ecclesiastical body known as the Roman Catholic Church or has ever placed itself by any voluntary act of its own under the power of the head of the diocese of the church, and where it is alleged that the Archbishop of the diocese refused to permit the congregation to purchase a property; that in defiance of and in opposition to his refusal it bought the property and paid for it with money of the congregation; that it employed the pastor without any knowledge that he had been assigned by the Archbishop and paid him the salary he demanded; and that in every respect it acted independently of the authority of the Roman Catholic Church, the court is without authority to decree that a trustee holding title to the church property for the use of the congregation shall convey it to the Archbishop of the diocese.

If a congregation is formed for the purpose of religious worship according to the faith and rites of the Roman Catholic Church, has accepted the pastor assigned to it by the Archbishop of the diocese, has placed itself under the authority of the Archbishop and submitted itself to his authority in all ecclesiastical matters, the title to its property must be taken and held as provided by the canons of the Roman Catholic Church. The property acquired by the congregation under such circumstances is the property of the church and is subject to its control and must be held in the manner directed by its laws. A congregation cannot divorce itself from the church or form an independent organization and retain the ownership of the property. **Thaddeus Dochkus v. Lithuanian Ben. Soc. of St. Anthony,** 25.

4. *Trial in church court—Review—Conspiracy.* The civil courts will not review the proceedings of ecclesiastical courts on matters which come within the jurisdiction of the latter.

A priest of the Protestant Episcopal Church cannot hold the bishop of his diocese and a member of his congregation liable in damages in an action of trespass for an alleged wilful and malicious conspiracy, where the evidence shows that the defendants combined to make charges against the priest for violation of church law, and for immorality and forgery, and supported these charges with evidence in a trial in an ecclesiastical court, which resulted in the degradation of the priest from the ministry; and this is the case although the acts of the defendants may have to some extent been influenced by vindictiveness and hatred. **Irvine v. Elliott,** 152.

COLLATERAL INHERITANCE TAX.

1. *Decedent's estates—Property in another state.* **Milliken's Est.,** 149.

COMMON CARRIERS.

1. *Street railways—Negligence—Measure of care—Passengers.* **Palmer v. Warren St. Ry. Co.,** 574.

CONFLICT OF LAWS.

1. *Husband and wife—Principal and surety—Affidavit of defense.* **Peter Adams Paper Co. v. Cassard,** 179.

CONSIDERATION.

1. *Mechanic's lien—Agreement not to file lien.* **Culver v. Pocono Spring Water Ice Co.,** 481.

2. *Payment—Accord and satisfaction—Payment before debt is due.* **Weiss v. Marks,** 513.

CONSPIRACY, see Criminal Law.

CONSTITUTIONAL LAW.

1. *Amendments of statutes—Mechanic's lien—Article* 3, *section* 6, *of the constitution—Act of June* 17, 1887, *P. L.* 409. When there is an established system of procedure in certain cases, whether it be by common law or statute or joint operation of both, a new act applying such system to a new class of cases by general reference to it, is not a violation of section 6, article 3, although it may operate to some extent as an extension of a previous statute.

The Act of June 17, 1887, P. L. 409, giving a lien for labor for or about certain construction work, and providing that the proceedings shall be such as "now provided by law in case of mechanics' liens," does not transgress the prohibition of section 6 of article 3 of the constitution, relating to amendments of statutes. **James Smith Woolen Mach. Co. v. Browne,** 543.

2. *Control of property by state—Presumption—Property of absentee—Administrators—Act of June* 24, 1885, *P. L.* 155. The regulation of the title and devolution of property within its limits is within the control and jurisdiction of the state.

The rules of evidence for the judicial ascertainment of facts in its courts, and as a corollary, the establishment of legal presumptions, are also within the control and jurisdiction of the state.

The state is not bound to have the regular and lawful use and ownership of property subject to the whim of an individual in absenting himself indefinitely or for a very long period of time from the state.

The Act of June 24, 1885, P. L. 155, entitled "An act relating to the grant of letters of administration upon the estates of persons, presumed to be dead, by reason of long absence from their former domicile," is constitutional.

The appointment of an administrator under the Act of June 24, 1885, P. L. 155, is a judicial act by a competent tribunal having jurisdiction of the subject-matter, and therefore cannot be attacked collaterally, but is valid until revoked by direct proceedings as prescribed in the statute.

As the proceedings under the act of 1885 are substantially in rem,

CONSTITUTIONAL LAW—*continued.*

for the conservation of property within the jurisdiction of the state, they are due process of law, and the act is constitutional.

Where the intent of a statute is plain, and its administration is committed to a court of known and established jurisdiction and methods under prior laws on similar subject-matters, such court is authorized to adapt its ordinary forms to the new requirements, or to devise and employ new ones of analogous kind suitable to carrying out the intent of the act. The orphans' court is such a court in regard to the act of June 24, 1885. **Cunnius v. Reading School Dist.,** 469.

3. *Corporations — Stock — Illegal issue of stock — Constitution of Pennsylvania, art.* 16, *sec.* 7—*Act of May* 7, 1887, *P. L.*94. **Yetter v. Del. Val. R. R. Co.,** 485.

4. *Title of statute—Waterworks—Boroughs—Act of May* 3, 1901, *P. L.* 140. The Act of May 3, 1901, P. L. 140, entitled, "An act authorizing boroughs to provide a supply of water for the use of the public either by the erection and operation of waterworks, or by contracts with persons or corporations authorized to supply water within the limits of said borough, or by both methods," is unconstitutional as to its second section, inasmuch as the title gives no notice of the provisions contained in the second section. **Potter Co. Water Co. v. Austin Boro.,** 297.

CONTRACTS.

1. *Affidavit of defense—Set-off.* **Andrews v. Blue Ridge Packing Co.,** 370.

2. *Agreement of attorneys—Practice, C. P.—Rules of court.* **Black v. Black,** 116.

3. *Agreement not to file mechanic's lien—Consideration.* **Culver v. Pocono Spring Water Ice Co.,** 481.

4. *Antenuptial agreement—Husband and wife—Will.* **Bowman v. Knorr,** 270.

5. *Breach of—Partnership—Suits—Assumpsit.* **McCollum v. Carlucci,** 312.

6. *Course of business—Architect—Contractor.* An architect cannot recover from the estate of a deceased builder for services in preparing plans for a store building, where the evidence shows that the builder never constructed the building, and that the uniform course of business between the deceased and the architect was for the latter to prepare drawings and plans for buildings, but to receive no pay therefor unless the deceased did the work under them. **McCaul's Est.,** 506.

7. *Electric lighting—Electric light company—Boroughs—Ordinance —Resolution—Estoppel.* **Lansdowne v. Citizens' Elec. Lt. & Power Co.,** 188.

8. *Estoppel—Assumption of debts of another—Receipt—Accord and satisfaction.* Where a creditor gives to his debtor a receipt in full for an amount stated which in fact was only a portion of the real claim, and the debtor uses the receipt as a basis for selling his entire stock of goods to a third person, who relying upon the receipt pub-

CONTRACTS—*continued.*

lishes a notice that he has assumed all of the debts of the debtor, the creditor is estopped by reason of the receipt from making any claim against the purchaser of the goods; and it is immaterial that as between the parties to the receipt there was no accord and satisfaction.

The rule that payment of a smaller sum is not a good accord and satisfaction for a larger one applies only between debtor and creditor, and not to third parties. **Ebert v. Johns,** 395.

9. *Estoppel—Notice—Taking over business of another—Assumptions of debts.* Where a person takes over the entire stock of goods of another and publishes or causes to be published a notice to the effect that he has assumed the debts for goods purchased by the previous owner, creditors of the previous owner are entitled to sue such person in their own names, if their claims are within the consideration, or on the principle of an estoppel, if they are led to believe so, and to act upon such belief to their prejudice in reliance on the notice. In such a case no question of the statute of fraud arises, for by the taking of the entire stock a consideration passed to the purchaser, and the creditors though not parties to the contract were parties to the consideration. **Sargent v. Johns,** 386.

10. *Ground rents—Agreement as to reduction of rent—Mistake in law—Equity—Remedy at law.* **Norris v. Crowe,** 438.

11. *Independent contractor.* The fact that the person alleged to be an independent contractor was employed at $2.00 per day and directed to employ other hands at $1.50 per day, is not necessarily inconsistent with the independent character of his employment. **Karl v. Juniata Co.,** 633.

12. *Insurance—Fire insurance—Cancelation—Action—Parties.* **Baldwin v. Penna. Fire Ins. Co.,** 248.

13. *Mortgage—Defense.* **Krimm v. Devlin,** 508.

14. *Municipal contracts—Decision of director of department of public works.* **Com. v. Pittsburg,** 379.

15. *Parties—Joint obligation—Corporation.* Wherever an obligation is undertaken by two or more, or a right given to two or more, it is the general presumption of law that it is a joint obligation or right. Words of joinder are not necessary for this purpose; but, on the other hand, there should be words of severance, in order to produce a several responsibility or a several right. Whether the liability incurred is joint, or several, or such that it is either joint or several at the election of the other contracting party depends (the rule above stated being kept in view) upon the terms of the contract, if they are express.

Whether the liability of covenantors is joint, or several, or both, depends exclusively upon the words of the covenant. The language of severalty or joinder is the test. The covenant is always joint unless declared to be otherwise.

Where the plaintiff by an instrument in writing agrees to build, equip and complete for 186 defendants, "a milk condensory plant," for the agreed price of $42,000, and the price so agreed upon is to be paid by the defendants who are also to furnish the land on which the plant is to be built, the contract is a joint obligation of

CONTRACTS—*continued.*

defendants, and it is immaterial that in the same paper the defendants agreed to become incorporated for the purpose of conducting the milk condensory, where it appears that the total subscription to the stock of such corporation in the paper was less than the contract price of the condensory and that thirty-six of the defendants subscribed to no stock at all but merely set opposite their names the number of cows whose milk would be furnished by them to the condensory. **Pittsley v. King,** 193.

16. *Performance—Impossibility of performance.* Impossibility of performance of a contract is in general no answer to an action for damages for nonperformance.

Impossibility of performance, whether such impossibility arises through the fault of the promisor or not, will not constitute a valid defense to an action for a breach of a contract. If the promisor makes the promise conditional upon its continued possibility, then the risk is assumed by the promisee and he loses his right of action, if the contingency arises. But if the promisor makes the promise unconditionally, then he assumes the risk, and as a general rule he cannot set up the impossibility of performance as a defense to an action by the promisee. **Montooth Boro. v. Brownsville Ave. St. Ry. Co.,** 338.

17. *Such contractors' bonds—Municipalities—Waiver—Evidence.* **Phila. v. Neill,** 333.

18. *Time as essence of contract—Agreement as to—Deed—Reconveyance.* **Svenson v. Rohrer,** 407.

19. *Water companies—Boroughs.* **Potter Co. Water Co. v. Austin Boro.,** 297.

CORPORATIONS.

1. *Agent—Evidence.* Where a person has been in the habit of acting as the business agent of a corporation with its knowledge and without objection, actual authority may be inferred from his acts, and the company will be bound by them.

A corporation will be bound by an agreement relating to a building operation made by a person assuming to be its agent, where the evidence shows that such person was a large stockholder and director of the corporation, a member of its executive committee, its secretary and treasurer, and the person named in the building contract as the representative of the company to whom reports were to be made by the building inspector, and to whom was given authority to approve or disapprove these reports, and who was apparently the general representative of the corporation. **Culver v. Pocono Spring Water Ice Co.,** 481.

2. *Bonds—Ownership of bonds—Evidence—Equity.* A bill in equity to recover the bonds of a corporation cannot be sustained where the plaintiff fails to show ownership of the bonds in himself, and merely shows that the bonds were issued to him as an officer of the corporation to be used in making purchases or raising funds for it.

A bill in equity filed by a person as owner of collateral to recover the collateral on the ground that the debt secured by it had been

CORPORATIONS—*continued.*

paid in full cannot be sustained, where it appears that the suit was not brought until twenty-six years from the time the right of action accrued, and that the delay was due to plaintiff's difficulty in establishing his title to the collateral as against another party. In such a case equity follows the law as to barring the action. **Kase v. Burnham,** 330.

3. *Capital stock of—Taxation—Coal on hand—Mining companies.* **Com. v. Del. Lack. & W. R. R. Co.,** 645.

4. *Contracts—Parties—Joint obligation.* **Pittsley v. King,** 193.

5. *Equity jurisdiction—Remedy at law—Mortgage—Suit against trustee.* **Sprigg v. Com. Title Ins. & Tr. Co.,** 548.

6. *Practice, C. P.—Affidavit of defense—Officer.* **Andrews v. Blue Ridge Packing Co.,** 370.

7. *Stock—Illegal issue of stock—Constitutional law—Constitution of Pennsylvania, article* 16, *section* 7—*Act of May* 7, 1887, *P. L.* 94. Under the Act of May 7, 1887, P. L. 94, which was passed to carry into effect section 7, article 16, of the constitution relating to the illegal increase of stock of a corporation, the remedy by proceedings on the part of the attorney general is exclusive, and no suit can be maintained by stockholders against the corporation to declare stock invalid. The Act of May 4, 1893, P. L. 29, does not give stockholders any such power. **Yetter v. Del. Val. R. R. Co.,** 485.

8. *Street railways—Special charter—Duty to repave streets—Act of April* 15, 1863, *P. L.* (1864) 1080. **Williamsport v. Williamsport Pass. Ry. Co.,** 65.

COSTS.

1. *Joint owners of tugboat—Managing owner—Duty to commence criminal prosecution—Duty to account.* **Croasdale v. Von Boyneburgk,** 15.

COUNTIES.

1. *Bridges—Repair of—Townships—Acts of April* 13, 1843, *P. L.* 221, *March* 30, 1859, *P. L.* 309, *and March* 12, 1860, *P. L.* 144. **Smith v. Muncy Creek Twp.,** 7.

CRIMINAL LAW.

1. *Conspiracy—Church law—Trial in church court—Review.* **Irvine v. Elliott,** 152.

2. *Martial law—Government—Riots—Order of governor.* **Com. v. Shortall,** 165.

3. *Murder—Evidence—Testimony taken before a justice of the peace.* On the trial of an indictment for murder against a man who did not understand the English language, the testimony of an absent witness given at a preliminary hearing before a justice of the peace, in the presence of the prisoner and in the language which he spoke and understood, is not admissible, where it appears that the prisoner was not represented by counsel at the preliminary hearing, and was not informed of his right to cross-examine. The admission of such tes-

CRIMINAL LAW—*continued.*

timony, however, does not call for a reversal, where the only statement contained in the testimony which could affect the prisoner injuriously was abundantly established at the trial by other testimony, and was virtually admitted by the prisoner himself. **Com. v. Lenousky,** 277.

DAMAGES.

1. *Contract—Performance—Impossibility of performance.* **Montooth Boro. v. Brownsville Ave. St. Ry. Co.,** 338.

2. *Injuries—Street railways—Wages.* In an action against a street railway company to recover damages for personal injuries, where the plaintiff states the amount of her wages at the time of the accident, and that she was obliged to "lay off" from her work for a certain number of weeks, it is not error for the court to instruct the jury that she could recover for wages lost. **Glenn v. Phila. & West Chester Trac. Co.,** 135.

3. *Measure of—Gas companies—Refusal to supply gas.* **Miller v. Wilkes-Barre Gas Co.,** 254.

4. *Negligence—Carlisle tables.* **Seifred v. Penna. R. R. Co.,** 399.

5. *Negligence—Evidence—Permanent injury—Ability.* **Palmer v. Warren St. Ry. Co.,** 574.

6. *Negligence—Extent of injuries—Question for jury.* **Smith v. Muncy Creek Twp.,** 7.

7. *Negligence—Ice on pavement.* **Brown v. White,** 106.

8. *Road law—Change of grade—Paving street.* **Devlin v. Phila.,** 518.

DEATH.

1. *Constitutional law—Control of property by state—Presumption—Property of absentee—Administrators—Act of June* 24, 1885, *P. L.* 155. **Cunnius v. Reading School Dist.,** 469.

2. *Evidence—Witness.* **Watkins v. Hughes,** 526.

3. *Negligence—Parent and child—Adult son—Evidence.* **Blauvelt v. Del. Lack. & W. R. R. Co.,** 141.

DECEDENT'S ESTATES.

1. *Attachment execution—Legacy—Acts of April* 13, 1843, *P. L.* 233, *and April* 10, 1849, *P. L.* 619—*Trusts and trustees—Spendthrift trust—Charity—Intestacy—Execution.* **Ellwanger v. Moore,** 234.

2. *Constitutional law—Control of property by state—Presumption—Property of absentee—Administrators—Act of June* 21, 1885, *P. L.* 155. **Cunnius v. Reading School Dist.,** 469.

3. *Contract—Course of business—Architect—Contractor.* **McCaul's Est.,** 506.

4. *Distribution—Absent heir.* The rights of a son, as an heir of his mother, cannot be disregarded in the distribution of her estate, notwithstanding he has been absent and unheard of for more than twenty-nine years. **Sherwood's Est.,** 465.

5. *Judgment lien—Real estate—Distribution of proceeds of sale.* A judgment obtained on an action against an executrix begun more than

DECEDENT'S ESTATE—*continued.*

five years after the death of the decedent is not a lien on the decedent's real estate, and is therefore not entitled to participate in the distribution of a fund arising the sale of such real estate. **Bowman v. Knorr,** 272.

6. *Orphans' court—Jurisdiction—Mutual accounts—Statute of limitations.* **Miller v. Fulton,** 595.

7. *Taxation—Collateral inheritance tax—Property in another state.* **Milliken's Est.,** 149.

8. *Will—Conversion—Power to sell.* **Cooper's Est.,** 628.

9. *Will—Power of sale—Condition—Landlord and tenant.* **Hanbest v. Grayson,** 59.

10. *Will—Sale of real estate—Intention of testator.* **Gehr v. McDowell; Strite v. Norton,** 100.

DEEDS.

1. *Evidence—Parol evidence.* On a bill in equity to cancel a deed, it appeared that at the time the bill was filed both grantor and grantee were dead. The grantor was the uncle of the grantee, and survived the grantee several years. There was evidence offered as to conversations between the parties to the effect that the grantee was to support and maintain the grantor, but these conversations were not connected closely enough with the execution of the deed to make them part of the res gestæ. There was evidence that the grantee in his last illness said to the grantor, "I cannot live to fulfill my contract—you will have to take your property into your own hands." It did not appear that the grantor took any steps to regain the property, and when he died it still stood in the grantee's name. *Held*, that the evidence was insufficient to sustain a cancelation of the deed in favor of the heirs of the grantor. **Fink v. Van Fossen,** 362.

2. *Reconveyance—Time—Agreement as to time—Time as essence of contract.* Where an agreement on its face shows that it was for a reconveyance of property originally conveyed as security for the payment of money, and the agreement specifies a time for the reconveyance, but the parties subsequently agree upon another and later time, the date then fixed becomes of the essence of the agreement, and if the party desiring the reconveyance does not tender the money on the date, and does not file a bill for a reconveyance until four months thereafter, the bill will be dismissed. **Svenson v. Rohrer,** 407.

DEVISES.

1. *Will—Heirs—Widow of son.* **Raleigh's Est., 451.**

DIRECTOR OF PUBLIC WORKS, see Public Officers.

DISCRETION OF COURT.

1. *New trials—Imposition of conditions.* **Stauffer v. Reading,** 479.

2. *Practice, C. P.—Affidavit of defense—Supplemental affidavit of defense—Allowance.* **Andrews v. Blue Ridge Packing Co.,** 370.

DOWER.

1. *Husband and wife—Fraud—Judgment—Scheme to defraud wife.* **Waterhouse v. Waterhouse,** 433.

ELECTRIC LIGHT COMPANIES.

1. *Boroughs—Ordinance—Resolution—Contract—Estoppel.* **Lansdowne v. Citizens' Elec. Lt. & Power Co.,** 188.

2. *Negligence—Presumption.* **Crowe v. Nanticoke Lt. Co.,** 374.

ELEVATORS.

1. *Negligence—Master and servant.* **Baldwin v. Urner,** 459.

2. *Unguarded shaft—Negligence—Province of court and jury—Evidence.* **Reid v. Linck,** 109.

EMINENT DOMAIN.

1. *Street railways—Elevated passenger railway—Injunction—Equity.* **Phila. & Tren. R. R. Co. v. Neshaminy Elev. Ry. Co.,** 343.

2. *Street railways—Turnpike roads—Act of May* 14, 1889, *P. L.* 211. **Hinnershitz v. United Trac. Co.,** 91.

EQUITY.

1. *Account—Joint owners of tugboat—Managing owner—Salary as such.* Where one of the owners of a tugboat, the boat being held by all the owners as tenants in common, proceeds against one of the other owners for an accounting, the joint owner whose duty it is to account, cannot claim a salary as managing owner, where it appears that no salary was ever paid to the managing owner of the boat; that the accountant as managing owner employed agents of the tugboat, who performed the duties as such, and were compensated by commissions upon the gross sums they handled; that the business of the boat was carried on at the office of one of the agents, the managing owner having no office; that the agents kept the accounts of the boat's receipts and expenditures, paid the crew and some of the bills, solicited and obtained business for the boat and had general charge of her; and where it further appears that it was the usual and customary arrangement in the business, that the managing owner should serve without charge, and the agent of the company be paid a percentage upon gross receipts. **Croasdale v. Von Borneburgk,** 15.

2. *Corporations—Ownership of bonds—Evidence.* **Kase v. Burnham,** 330.

3. *Deeds—Evidence—Parol evidence.* **Fink v. Van Fossen,** 362.

4. *Equity jurisdiction—Remedy at law—Account render.* While the act of October 13, 1840, confers concurrent jurisdiction upon courts of equity in all cases where account render previously lay, the jurisdiction of the court which first takes actual cognizance of the controversy becomes exclusive in the absence of any peculiar equitable grounds to the contrary. **Sprigg v. Com. Title Ins. & Tr. Co.,** 548.

5. *Equity jurisdiction—Remedy at law—Corporations—Mortgage—Suit against trustee.* Where a corporation mortgage provides that the trustee shall not certify an issue of bonds until money sufficient to

EQUITY—*continued.*

pay the first four coupons has been paid to the trustee, and the trustee by the direction of the corporation agrees to hold certain of the bonds in trust to secure the performance of a contract on the part of the corporation, without requiring the deposit of any money to pay the first four coupons, the person for whom the bonds are held in trust cannot maintain a bill in equity against the trustee to recover damages for failure to have in hand the money for the coupons, or for alleged false allegations as to title of the mortgaged premises made by the trustee to such person.

Where a trustee of a corporation mortgage agrees not to issue bonds until a sum sufficient to pay the first four coupons are deposited with it, and certain persons to whom the bonds are issued deposit the amount of the four coupons, and subsequently receives such amount back, the trustee is not liable to other parties for such repayment. **Sprigg v. Com. Title Ins. & Tr. Co.,** 548.

6. *Equity jurisdiction—Remedy at law.* Where no decree is sought but one for the payment of money, which can be as easily recovered in an action at law, and there are no mutual demands, nor complicated accounts nor discovery sought, the case is not one of specific relief, and consequently does not fall within the equity head of granting relief where a recovery in damages would be an inadequate remedy. **Sprigg v. Com. Title Ins. & Tr. Co.,** 548.

7. *Equity practice—Equity rules—Master—Corporation—Elections.* Since the adoption of the new equity rules the court of common pleas has no power to appoint a master to conduct a corporate election if there is no decree ordering the election; and not even the consent of the parties can give it such power. **Yetter v. Del. Val. R. R. Co.,** 485.

8. *Equity practice—Exceptions to decree nisi—Filing exceptions nunc pro tunc—Appeals.* Where the court permits exceptions to be filed nunc pro tunc after the expiration of ten days from the entry of the decree nisi, and the exceptions are subsequently dismissed and a final decree entered, the statutory period of six months for taking an appeal begins to run from the entry of the final decree.

It is within the legal discretion of a judge sitting as a chancellor to permit exceptions to be filed nunc pro tunc after the expiration of ten days from the entry of a decree nisi.

The equity rules are the rules of all the courts, to be enforced as of course in all of them, and not relaxed or disregarded as matter of mere indulgence or convenience. But on the other hand they are like all other rules of practice, subject to the judicial discretion of the chancellor as to their strict enforcement under circumstances productive of injustice or exceptional hardship. **Hinnershitz v. United Trac. Co.,** 91.

9. *Equity practice—Findings of fact and conclusions of law.* Where counsel present requests for findings of fact and for conclusions of law, the judge is bound to answer each by adopting, affirming, qualifying or denying it. It is not sufficient that such requests may be substantially answered by the judge's own independent findings, if he does not indicate in connection with each request itself what he regards as

EQUITY—*continued.*

his answer, to be found in his own independent findings. **Lehigh Val. Coal Co. v. Everhart,** 118.

10. *Findings of fact—Appeals—Review.* Findings of fact by the trial judge in an equity suit, based upon sufficient evidence, and approved by the court in banc, will not be reversed by the appellate court, except for manifest error. **Watkins v. Hughes,** 526.

11. *Ground rents—Agreement as to reduction of rent—Mistake in law—Remedy at law.* **Norris v. Crowe,** 438.

12. *Jurisdiction—Adequate remedy at law.* In modern equity practice a complainant in a court of equity cannot be turned on the court for want of jurisdiction merely because he has a remedy at law; it must be shown further that his remedy at law is adequate.

Where on an appeal from a decree dismissing a bill in equity for want of jurisdiction, the opinion of the court below and the record are so meagre that the appellate court cannot determine whether the plaintiff had or had not an adequate remedy at law, the decree will be reversed, and the record remitted for further proceedings. **Gray v. Citizens' Gas Co. of Port Richmond,** 303.

13. *Mistake—Ignorance of the law.* In no case is ignorance or mistake of the law with the full knowledge of the facts, per se a ground for equitable relief. If the evidence shows, that in addition there would be great hardship in enforcing the contract made in ignorance of the law, equity may afford relief. But between the border of great hardship and actual fraud there are many contracts made in ignorance of the law, yet which result in no inequitable consequences from the enforcement of the general rule. In such cases the rule should be enforced. **Norris v. Crowe,** 438.

14. *Mistake of fact—Evidence.* Equity will not grant relief in cases of mistake of fact except on very clear proof. **Ridgway's Account,** 587.

15. *Mistake of fact—Statute of limitations.* Where several owners of coal lands form a corporation in which they are to take stock according to their respective interest in the lands, and the president of the corporation by a mistake does not receive his full share, he cannot, after he has remained silent for fourteen years with full means of knowledge and every opportunity to discover the mistake, and after the person to whom his shares were issued is dead, have any standing in a court of equity to have the mistake corrected.

The operation of the statute of limitations will not be stayed by the mere mistake or ignorance of a party who had full means of knowledge at hand, and this is especially true where there is no allegation of fraudulent concealment. **Ridgway's Account,** 587.

16. *Nuisance—Public nuisance—Parties.* **Rhymer v. Fretz,** 230.

17. *Parties—Cross bill—Partnership.* Where on a bill in equity between partners for an accounting, the plaintiff admits a debt due by the partnership to a third person, but such debt is denied by the defendant, and the alleged creditor becomes a party defendant by intervention and by notice, and in the accounting the debt is established, the court may enter a decree in favor of the intervening creditor without any cross bill ever having been filed by him.

EQUITY—*continued.*

The general rule which requires a defendant to file a cross bill when seeking to enforce his rights, does not apply in cases of accounting where a balance is found due to the defendant, nor in cases where there are adverse interests between the codefendants. **Kelley v. Shay,** 208.

18. *Question at issue—Railroad—Siding on street—Grade.* The only issues to be passed upon in a suit in equity are those raised by the pleadings.

Where the sole object of a bill in equity is to prevent a railroad company from laying a siding in a street in any other manner than upon the established grade of the street, the court cannot consider the question of the power of the city councils to grant permission to the railroad company to construct a siding upon the street. **Zook v. Penna. R. R. Co.** 603.

19. *Remedy at law—Attorney at law—Counsel fees.* **Quakertown & Eastern R. R. Co. v. Guarantors' Liability Indem. Co.,** 350.

20. *Street railways—Elevated passenger railway—Eminent domain—Injunction—Appeals—Assignments of error—Exceptions.* **Phila & Tren. R. R. Co. v. Neshaminy Elev. Ry. Co.,** 343.

21. *Telegraph and telephone companies—Municipalities—Laches—Estoppel.* **Bradford v. N. Y. & Penna. Telep. & Teleg. Co.,** 582.

ESCHEATS.

1. *Disappearance of legatees—Statute of limitations—Act of May 2, 1889, P. L. 66.* The right of the commonwealth to escheat a legacy is barred by section 26 of the act of May 2, 1889, where it appears that the legatee disappeared prior to the death of the testator, that he never claimed the legacy although search and advertisement was made for him, and that the commonwealth did not institute escheat proceedings until more than forty years after the death of the testator. **Bousquet's Est.,** 534.

ESTOPPEL.

1. *Boroughs—Ordinance—Resolution—Electric light company—Contract.* **Landsdowne v. Citizens' Elec. Lt. & Power Co.,** 188.

2. *Contract—Assumption of debts of another—Receipt—Accord and satisfaction.* **Ebert v. Johns,** 395.

3. *Contract—Notice—Taking over business of another—Assumption of debts.* **Sargent v. Johns,** 386.

4. *Street railways—Consent of landowner—Laches.* **Hinnershitz v. United Trac. Co.,** 91.

5. *Telegraph and telephone companies—Municipalities—Laches—Equity.* **Bradford v. N. Y. & Phila. Telep. & Teleg. Co.,** 582.

EVIDENCE.

1. *Appeals—Assignments of error.* **Fitzpatrick v. Union Trac. Co.,** 335.

2. *Appeals—Findings of facts.* **Kelley v. Shay,** 215.

3. *Attorney at law—Witness—Confidential communication.* **Sargent v. Johns,** 386.

EVIDENCE—*continued.*

4. *Church membership.* Where a bill in equity to compel the conveyance of a church property by a trustee to the Archbishop of the diocese avers that a majority of the members of the congregation desired the title conveyed to the Archbishop and this allegation is denied in the answer, the court is in error in excluding the testimony of the secretary of the congregation as to the number who favored the title remaining in the name of the trustee. **Thaddeus Dochkus v. Lithuanian Ben. Soc. of St. Anthony,** 25.

5. *Computation—Jury.* Where there is data in evidence from which the jury may make a computation, it is not error to refuse to permit a witness to make the computation. **Blauvelt v. Del. Lack. & W. R. R. Co.,** 141.

6. *Corporation—Agent.* **Culver v. Pocono Spring Water Ice Co.,** 481.

7. *Corporation—Bonds—Ownership of—Equity.* **Kase v. Burnham,** 330.

8. *Criminal law—Murder—Testimony taken before a justice of the peace.* **Com. v. Lenousky,** 277.

9. *Cross-examination—Contradiction of witness.* Where a witness has been cross-examined on matters material to the issue to which he testified in chief, his answers on cross-examination may be contradicted by other witnesses. **Blauvelt v. Del. Lack. & W. R. R. Co.,** 141.

10. *Deeds—Parol evidence.* **Fink v. Van Fossen,** 362.

11. *Equity—Mistake of fact.* **Ridgway's Acct.,** 587.

12. *Judgment—Opening judgment—Appeals.* **Lauer Brewing Co. v. Chmielewski,** 90.

13. *Lunacy—Lucid interval.* Statements made by a defendant lunatic within the period covered by the finding of the inquisition are inadmissible, unless the evidence shows that such statements were made during lucid intervals. **Hottle v. Weaver,** 87.

14. *Lunacy—Signing of check—Province of court and jury.* **Central Guarantee Tr. & S. D. Co. v. White,** 611.

15. *Marriage—Legitimacy—Partition.* **Dailey v. Frey,** 227.

16. *Memorandum—Set-off.* In an action on a promissory note an unsigned memorandum made by the defendant in his book of original entries, is not admissible as evidence of set-off. It is only available to refresh the recollection of the witness. **Hottle v. Weaver,** 87.

17. *Model—Negligence.* In an accident case a model of a scaffold not put in evidence nor treated as such, may be used for illustration of the description by a witness of the mode of building the scaffold. **Geist v. Rapp,** 411.

18. *Municipalities—Subcontractor's bonds—Waiver.* **Phila. v. Neill,** 333.

19. *Negligence—Damages—Permanent injury—Ability.* **Palmer v. Warren St. Ry. Co.,** 574.

20. *Negligence—Opinion of witnesses—Grade crossing.* **Seifred v. Penna. R. R. Co.,** 399.

21. *Negligence—Railroads—Grade crossing—"Stop, look and listen"*

EVIDENCE—*continued.*

—Presumption—Death—Parent and child—Adult son. **Blauvelt v. Del. Lack. & W. R. R. Co.,** 141.

22. *Negligence—Railroads—Master and servant—Explosion of locomotive.* **Marsh v. Lehigh Val. R. R. Co.,** 558.

23. *Negligence—Unguarded elevator shaft—Province of court and jury.* **Reid v. Linck,** 109.

24. *Partnership—Loan.* **Williams v. Williams,** 644.

25. *Res gestæ—Declarations—Negligence—Railroads.* In an action against a railroad company to recover damages for the death of one of its conductors caused by a broken rail, it is not error for the court to exclude proof offered by the plaintiff of declarations made about half an hour after the accident by the division foreman. **Briggs v. E. Broad Top R. R. & Coal Co.,** 564.

26. *Will—Probate—Identity of testatrix.* **McAndrew's Est.,** 366.

27. *Witness—Cross-examination.* The cross-examination of a witness should be confined to matters in regard to which he has been interrogated in chief, or to such questions as may tend to show his bias, interest or relation to the party calling him, or test his knowledge, integrity and accuracy of statement. A party should not be permitted to establish his claim or to prove his defense by a cross-examination of the witnesses of his opponent. Such is not the purpose for which a witness is cross-examined. While this is the rule, yet the range of a cross-examination, to a very great extent, must be left to the sound discretion of the trial judge, and unless that discretion has been plainly abused, to the injury of the party complaining, it is not ground for reversal.

If part of a conversation be given in chief the rest of it may be elicited on cross-examination.

Where a witness has stated a fact he may be asked by the other party to detail all the circumstances within his knowledge which qualify it even though they may constitute new matter and form a part of his own case.

In an action by a woman against a street railway company to recover damages for personal injuries, a physician called by the defendant testified that he had concealed from the plaintiff while he was treating her professionally, and, as she thought, as her own physician, the fact that he was surgeon of the company, in order that he might secure information which would place him in a position "to be ready for anything that might come in the future." Subsequently plaintiff came to the physician at his request, and he testified that he told her that he thought he could get some compensation for her from the company. He was then asked on cross-examination if in that conversation he did not deny to plaintiff that he was the surgeon of the company. *Held*, that the cross-examination was proper, as it elicited the balance of the conversation, part of which the witness had given, and also tended to impeach his credibility. **Glenn v. Phila. & West Chester Trac. Co.,** 135.

28. *Witness—Party dead.* Where a party to a suit, otherwise incompetent by reason of the death of another, is called for cross-examination by the adverse party, and examined as to matters occurring in

EVIDENCE—*continued.*

the lifetime of the decedent, he is thereby rendered a competent witness for himself on all relevant matters. **Watkins v. Hughes,** 526.

EXECUTIONS.

1. *Attachment execution — Legacy — Decedent's estates — Act of April* 13, 1843, *P. L.* 233, *and April* 10, 1849, *P. L.* 619—*Trusts and trustees — Spendthrift trust — Charity — Intestacy — Execution.* **Ellwanger v. Moore,** 234.

2. *Mortgage—Defeasance.* Where an owner of land conveys the same to a bank as security for notes, and no defeasance is executed at the time, and subsequently the bank conveys the land to a guarantor of the notes who has paid them, and thereafter the guarantor who has a judgment against the original owner issues execution thereon and sells the land as the land of the original owner, and buys it in, and the proceeds are sufficient to pay all judgments, the guarantor cannot claim the whole proceeds on the theory that the land really belonged to her. In such a case the original owner had an equity in the land, although not enforceable by reason of the Act of June 8, 1881, P. L. 84, and such equity is an interest which any creditor may sell on execution for whatever any purchaser may choose to give for it. **Eberly v. Shirk,** 414.

EXECUTORS AND ADMINISTRATORS.

1. *Bill of exchange—Presentation—Delay—Negligence—Acceptance of notes—Lunacy.* **Aspinwall v. Viney,** 383.

2. *Constitutional law—Control of property by state—Presumption—Property of absentee—Act of June* 24, 1885, *P. L.* 155. **Cunnius v. Reading School Dist.,**469.

3. *Practice, C. P.—Affidavit of defense—Affidavit of executor—Rules of court.* **Helffrich v. Greenberg,** 516.

4. *Trusts and trustees—Sale of real estate.* **Gehr v. McDowell; Strite v. Norton,** 100.

5. *Wills—Probate—Evidence—Identity of testatrix.* **McAndrew's Est.,** 366.

EXPERTS.

1. *Will—Probate—Issue d. v. n.—Testamentary capacity—Undue influence.* **Richmond's Est.,** 219.

FALSE IMPRISONMENT.

1. *Malicious prosecution—Arrest without information—Boroughs.* Where a burgess of his own motion and without complaint on oath or affirmation and not on view, issues a warrant for another person for violating a borough ordinance, and such person is arrested and imprisoned, the burgess is liable in nominal damages at least for false imprisonment. **Kossouf v. Knarr,** 146.

FEES.

1. *Counsel fees—Attorney at law—Remedy at law.* **Quakertown & Eastern R. R. Co. v. Guarantors' Liability Indem. Co.,** 350.

FINDINGS OF FACTS.

1. *Appeals—Assignments of error—Equity—Exceptions.* **Phila. & T. R. R. Co. v. Neshaminy Elev. Ry. Co.,** 343.

2. *Appeals—Assignments of error—Findings of fact and law.* **Kase v. Burnham,** 330.

3. *Appeals—Evidence.* **Kelley v. Shay,** 215.

4. *Auditor—Mistake of fact—Review.* **Ridgway's Account,** 587.

5. *Conclusions of law—Equity practice.* **Lehigh Val. Coal Co. v. Everhart,** 118.

6. *Equity—Appeals—Review.* **Watkins v. Hughes,** 526.

FORGERY.

1. *Banks and banking—Checks—Indorsement.* **Second Nat. Bank v. Guarantee Tr. & S. D. Co.,** 616.

FRAUD.

1. *Scheme to defraud wife—Husband and wife—Dower—Judgment.* **Waterhouse v. Waterhouse,** 433.

GAS COMPANIES.

1. *Liability of tenant for former tenant's gas bill—Notice.* A gas company chartered for the purpose of supplying with gas a municipality and such individuals residing therein as might desire gas, and having the right of eminent domain, is bound to supply gas to any resident of the municipality, and it cannot refuse such a supply to a tenant because of a refusal of the latter to pay a former tenant's gas bill, if it appears that the tenant before going into possession had no actual notice that he would be required to pay such bill, and was not affected with constructive notice by any resolution or by-law of the company to that effect. **Miller v. Wilkes-Barre Gas Co.,** 254.

2. *Refusal to supply gas—Damages—Measure of damages.* In an action by a saloon keeper against a gas company to recover damages for the refusal of the defendant to furnish gas to plaintiff, it is error for the court to permit the jury to include in its verdict a recovery for loss of profits where the plaintiff has produced no books of account, bills, vouchers, or any written or parol evidence of his profits before he was deprived of gas, and of his profits thereafter, and nothing is produced to the jury upon which they could base any inference that there had been any loss of profits. **Miller v. Wilkes-Barre Gas Co.,** 254.

GROUND RENTS.

1. *Agreement as to reduction of rent—Mistake in law—Equity—Remedy at law.* Where an owner of a ground rent agreed in writing under a threat of payment of principal to reduce the rent from six per cent to five per cent, and both the owner of the ground rent and the terretenant were ignorant at the time of the agreement of the decision in Palairet v. Snyder, 106 Pa. 227, in which it was held that a ground rent of the kind in question was an irredeemable one, the mistake in law is no ground for the interference of a court of equity to cancel the

GROUND RENTS—*continued.*

agreement in the interest of the owner of the ground rent. In such a case there is no element of such extreme hardship as will call for a departure from the general rule.

In the above case after the ground landlord discovered his mistake he brought an action at law to recover the full six per cent, and while this action was pending filed a bill in equity to cancel the agreement. *Held*, that the bill should be dismissed, because (1) plaintiff had a full, adequate and convenient remedy at law, and (2) equity had no jurisdiction to correct the mistake of law alleged. **Norris v. Crowe,** 438.

GUARANTY.

1. *Insurance—Title insurance—Indemnity.* **Wheeler v. Equitable Tr. Co.,** 428.

GUARDIAN AND WARD.

1. *Trusts and trustees—Removal of guardian—Removal of trustee.* A testamentary trustee who was also guardian of testator's minor child, will be removed where it appears that he lost three years' rent of premises through imprudent indulgence of tenants; that he resisted a suit by which the sum of $1,413 was found to be in his hands, belonging to the estate of a sister of the minor, in which the minor had an ultimate interest; that he made no attempt to invest the sum of $1,175 belonging to his ward, but with which he had erroneously debited himself in his account as trustee; and that after having been ordered by the court to transfer this amount to his account as guardian he denied before the examiner that he was accountable in that capacity. **Mansfield's Est.,** 64.

2. *Trust and trustees—Removal of trustee.* While a guardian should not be appointed trustee of the estate in which his wards are interested, yet if he has been so appointed, he will not be removed as trustee after all the minors are of age, merely because of the irregularity of his appointment. **Wallace's Est.,** 105.

HIGHWAYS.

1. *Crossing of—Railroads—Judicial supervision—Act of June 7, 1901, P. L.* 531. **Mifflinville Bridge,** 420.

2. *Defect in—Negligence—Province of court and jury.* **Behl v. Phila.,** 329.

3. *Duty to repave streets—Street railways—Special charter—Act of April 15, 1863, P. L.* (1864) 1080. **Williamsport v. Williamsport Pass. Ry. Co.,** 65.

4. *Hole in sidewalk—Negligence—Contributory negligence—Province of court and jury.* **Iseminger v. York Haven Water & Power Co.,** 591.

5. *Paving street—Road law—Change of grade—Damages.* **Devlin v. Phila.,** 518.

HOMICIDE, see Criminal Law.

HUSBAND AND WIFE.

1. *Antenuptial agreement—Will.* A wife who under an antenuptial agreement is entitled to one third of the income of her husband's real and personal estate for life, "and in addition thereto so much of the principal as in her judgment shall be necessary for her comfortable maintenance," is entitled to the custody of the whole estate, or of the proceeds of any sale thereof, although she takes out letters testamentary as sole executrix under a subsequent will of her husband by which her enjoyment of the one-third income is reduced from life to widowhood, the will, however, stating "this will so far as my wife is concerned is according to antenuptial agreement hereto attached." **Bowman v. Knorr,** 270.

2. *Dower—Fraud—Judgment—Scheme to defraud wife.* The law will lay its hands upon a fraudulent scheme to deprive the wife of her dower and will open or stay proceedings upon a judgment confessed without a full bona fide consideration.

A husband became hostile to his wife and threatened that if she did not leave the home in which she lived that he would get rid of all his property and leave the state. Shortly after he confessed a large judgment to his brother, upon which execution was issued and the house where the wife lived was seized and advertised for sale. The wife then filed a petition to intervene so as to protect her dower rights, and for a rule to open the judgment. On testimony taken under the rule the two brothers refused to answer relevant questions until they were forced to do so by the court. Their testimony as to the consideration for the judgment note was not free from contradictions. *Held*, that the wife was entitled to have the judgment opened, and also to have an issue to determine (1) whether there was a good consideration for the judgment, and (2) whether the judgment had been confessed collusively for the purpose of defrauding her. **Waterhouse v. Waterhouse,** 433.

3. *Powers of married woman.* In Pennsylvania every restriction imposed by the common law upon the capacity of a married woman to contract has been removed except in two cases; she cannot become accommodation indorser, maker or guarantor or surety for another; she cannot without her husband joins convey or mortgage her real estate. **Peter Adams Paper Co. v. Cassard,** 179.

4. *Principal and surety—Conflict of laws—Affidavit of defense.* Where a statement of claim and an affidavit of defense show that the contract upon which suit was brought was made constructively at least, in New York, and that it was a contract of suretyship by a wife for her husband's debt, and there is nothing to show what was the law of New York on the subject, the court will assume the wife's disability in New York the same as in Pennsylvania, and will discharge a rule for judgment for want of a sufficient affidavit of defense. **Peter Adams Paper Co. v. Cassard,** 179.

INFANTS.

1. *Suit against—Next friend—Guardian.* An infant defendant can only appear by a guardian, general or ad litem. **Mitchell v. Spaulding,** 220.

INFORMATION.

1. *Arrest without information—Malicious prosecution—Boroughs.* **Kossouf v. Knarr,** 146.

INJUNCTION.

1. *Street railways—Elevated passenger railway—Eminent domain—Equity.* **Phila. & Tren. R. R. Co. v. Neshaminy Elev. Ry. Co.,** 343.

INSURANCE, see Beneficial Associations.

INSURANCE.

1. *Accident insurance—Employer's insurance—Application—Schedule.* An employer's accident policy contained this provision: "This policy does not cover loss from liability for injuries as aforesaid to, or caused by, any person unless his wages are included in the estimated wages hereinafter set forth and he is on duty at the time of the accident in an occupation hereinafter described at the place or places mentioned in the schedule." The application for the policy contained the following: "The estimated pay roll does not include the wages paid by subcontractors." Before the application was signed the word "not" in the item was stricken out, and the answer written was "yes." The schedule attached to the policy contained the exact words of this item, except that in the schedule the word "not" was not stricken out. The answer "yes" was written after the item in the schedule the same as after the item in the application. *Held*, that the wages of an employee of a subcontractor were included in the estimated wages, and that if the insured was compelled to pay damages for injuries to such an employee, he could recover on the policy. **Dives v. Fidelity & Casualty Co. of N. Y.,** 199.

2. *Accident insurance—Pleading.* In an action on two contractor's liability policies of accident insurance, where the plaintiffs declare in separate counts upon each of the two policies, under the one claiming that the person injured was their employee, and under the other that he was not, and the defendant pleads without objection to the declaration, the court commits no error in refusing defendant's motion made at the beginning of the trial "that the plaintiffs be directed to elect on which of the two counts of the declaration they would proceed." **Dives v. Fidelity & Casualty Co. of N. Y.,** 199.

3. *Fire insurance — Cancelation — Contract — Action — Parties.* A partnership consisting of two persons owned a policy of fire insurance which covered a building insured for an amount stated and the merchandise therein also for an amount stated. While the policy was in existence the partnership was dissolved, one of the partners transferring his interest in the merchandise to the other, and the latter his interest in the real estate to his copartner. At the same time they agreed that the policy should be changed to accord with their several interests. Four days after the dissolution the partner to whom the real estate had been conveyed died, and immediately thereafter the surviving partner informed the agents of the insurance company of the fact, and of what had been arranged. It was agreed between the surviving partner and the insurance company's agent that the com-

INSURANCE—*continued.*

pany should issue two new policies, one to the surviving partner on the merchandise, and one to the deceased partner on the building, and that the two should be dated as of the day of the dissolution of the partnership. The company agreed to send the policy for the real estate to the attorney of the deceased partner. When the attorney received it he noticed that it was made out in the name of the deceased as the insured. Thinking that it was a mistake to have the policy issued in the name of the dead man, he sent it back to the agents with a request that it should be made out to the estate of the deceased. The agents persisted in their opinion that it was correctly made out and returned it. The attorney sent it back by a messenger, with instructions to explain the circumstances fully to the agents. The agents, however, adhered to their first opinion and asked the messenger whether the attorney wanted the policy canceled. He answered that the attorney did not want it canceled, and that the attorney would call and see them about it in a few days. He did call but failed to see the agents. Within a year afterwards a fire occurred which destroyed both building and merchandise. The company denied liability for loss on the building alleging that the policy had been canceled before the fire. In a suit upon the policy it appeared that the company had not canceled the insurance in the manner prescribed by the policy by five days' notice, and the return of the unearned premium. *Held*, that the contract as to the new policy on the building was complete when the surviving partner acting as agent for his copartner and the insurance agent both agreed to it, and that the insurance company was liable for the loss of the building.

In such a case, it appearing that the insurance was for the insured or his legal representative, the suit can be sustained in the name of the administrator of the deceased partner, subject to the jurisdiction of the orphans' court to distribute the fund raised by it. **Baldwin v. Penna. Fire Ins. Co.,** 248.

4. *Mutual fire insurance—Assessments—Payment—Notice.* Where a mutual fire insurance company sends to a member a notice in the form of a bill to pay an assessment, and the notice also states that the treasurer of the company will be at certain places at dates named, to receive the assessments, and a by-law of the company provides that assessments must be paid within thirty days from the date of the notice, a member cannot claim that he is entitled to thirty days from the date when the treasurer was to be at a place in the member's neighborhood. He must pay within thirty days of the date of the notice.

In an action to recover for a loss sustained by a fire after the expiration of the notice for payment of such assessment, plaintiff cannot offer in evidence the next subsequent notice of assessment which was different in form from the prior one. Such notice is not competent evidence that the former one was insufficient. **Shuman v. Juniata Farmers Mut. Fire Ins. Co.,** 417.

5. *Title insurance—Indemnity—Guaranty.* In an action upon a policy of title insurance which by its terms was a general contract of indemnity against loss from defects or unmarketability of title, but

INSURANCE—*continued.*

which contained in a note to a schedule a guaranty to complete certain buildings according to plans and specifications mentioned, the court will construe the whole contract to be one of indemnity, and will not permit the plaintiff to prove that the houses were not built in accordance with the plans and specifications, unless there is prior proof that the plaintiff suffered actual loss.

The note in such a case is intended to signify that if the buildings should not be completed in accordance with the specifications, then, if any loss be sustained thereby by plaintiff, such loss should come under the indemnification covenant of the policy. The contract is not intended by its terms to be severed into two, one to indemnify against loss from defects of title, and one to guarantee that the building shall be finished in accordance with the plans and specifications. **Wheeler v. Equitable Tr. Co.,** 428.

INTEREST.

1. *Partnership—Settlement of accounts.* **Kelley v. Shay,** 215.

INTESTACY.

1. *Attachment execution—Legacy—Decedent's estates—Acts of April* 13, 1843, *P. L.* 233, *and April* 10, 1849, *P. L.* 619—*Trusts and trustees—Spendthrift trust.* **Ellwanger v. Moore,** 234.

ISSUE D. V. N.

1. *Will — Probate — Testamentary capacity — Undue influence.* **Kane's Est.,** 204; **Richmond's Est.,** 219.

2. *Will—Probate—Undue influence.* **Alexander's Est.,** 47.

JUDGMENTS.

1. *Banks and banking—Checks—Forgery—Indorsement.* **Second Nat. Bank of Pittsburg v. Guarantee Tr. & S. D. Co.,** 616.

2. *Husband and wife—Dower—Fraud—Scheme to defraud wife.* **Waterhouse v. Waterhouse,** 433.

3. *Lien—Decedent's estate—Real estate—Distribution of proceeds of sale.* **Bowman v. Knorr,** 272.

4. *Municipalities—Indebtedness—Special tax levy.* **Plains Township's Appeal,** 556.

5. *Opening judgment—Evidence—Appeals.* A judgment for goods sold and delivered will not be opened on the ground that the defendant was overcharged, where it clearly appears that he had received a postal card with notice of each consignment charged to him, had made no complaint at the time, had gone over his account at the plaintiff's office, and had agreed upon a balance and paid it, at a date subsequent to many of the items to which he objected.

On an appeal from an order refusing to open a judgment entered on a bond, the defendant cannot claim in the appellate court that he was erroneously sued as a purchaser, when a matter of fact he was described in the bond as an agent of the plaintiff, if he made no such claim in the court below. **Lauer Brewing Co. v. Chmielewski,** 90.

JUDGMENTS—*continued.*

6. *Partnership—Parties—Joint action—Res adjudicata.* **McFarlane v. Kipp,** 317.

JURISDICTION, EQUITY.

1. *Adequate remedy at law.* **Gray v. Citizens' Gas Co. of Port Allegheny,** 303.

2. *Remedy at law—Corporations—Mortgage—Suit against trustee—Account render.* **Sprigg v. Com. Title Ins. & Tr. Co.,** 548.

JURISDICTION, O. C.

1. *Jurisdiction—Mutual accounts—Statute of limitations.* The orphans' court has no jurisdiction to adjudicate two items of claims against the estate of a decedent where there were between the decedent and the claimant numerous transactions in which there were mutual obligations requiring an account which could only be adjusted in a court of general equitable jurisdiction. Such an adjudication by the orphans' court of the two claims will not prevent the running of the statute of limitations against the claims. **Miller v. Fulton,** 595.

JURY AND JUROR.

1. *New trials—Discretion of court—Imposition of conditions.* **Stauffer v. Reading,** 479.

2. *Relationship between jury and party—Trial—New trial.* **Geist v. Rapp,** 411.

LACHES.

1. *Bill of exchange—Presentation—Delay—Negligence—Acceptance of notes—Lunacy.* **Aspinall v. Viney,** 383.

2. *Street railways—Consent of landowner—Estoppel.* **Hinnershitz v. United Trac. Co.,** 91.

3. *Telegraph and telephone companies—Municipalities—Estoppel—Equity.* **Bradford v. N. Y. & Penna. Telep. & Teleg. Co.,** 582.

LAND LAW.

1. *Surveys—Warrants—Boundaries.* The marks of a block consist of the marks, if such are found, of every tract of the block and the marks if originally intended as corners for a particular tract become marks for locating the whole block.

The location of a block of surveys may be established from a single undoubted monument of the block on the ground if there be no others, by the courses and distances in the return; the interior tracts must then be located relatively wholly from the return of the block; but the return may show marks for corners of the interior tracts; if these be found upon the ground they establish the lines of these interior tracts although this may to some extent disturb the lines of the block; such a location of an interior tract of a block although it may somewhat change the course of the exterior line as plotted in the return or shorten that line running from the leading warrant, yet giving effect to the fact, does not disregard the established rule, that

LAND LAW—*continued.*

a member of a block cannot be wrested from its position and be located outside of it; it is not thereby wrested from the block but its position is relatively the same as in the return although one of the exterior lines of the block has been for a short distance deflected from its course to accord with that established monuments on the ground of the interior tract common to it and the block of which it is a member; but there can be no block of surveys in either a popular or legal sense where the tracts are not contiguous.

In a land case where the location of two contiguous tracts of a block depends upon the position of an interior line of the block, and the evidence as to the marks of early surveys is conflicting, the case is for the jury. **Knupp v. Barnard,** 280.

LANDLORD AND TENANT.

1. *Mechanic's lien—Oil and gas wells—Act of June* 17, 1887, *P. L.* 409—*Labor—Materials—Leasehold.* **James Smith Woolen Mach. Co. v. Browne,** 543.

2. *Mines and mining—Lease—Royalties.* **Lehigh Val. Coal Co. v. Everhart,** 118.

3. *Will—Power of sale—Condition.* **Hanbest v. Grayson,** 59.

LEASES.

1. *Mines and mining—Royalties.* **Lehigh Val. Coal Co. v. Everhart,** 118.

2. *Street railways—Municipal consent—Traction company.* **Conshohocken Boro. v. Conshohocken Ry. Co.,** 75.

LEGACIES.

1. *Attachment execution—Decedent's estate—Acts of April* 13, 1843, *P. L.* 233, *and April* 10, 1849, *P. L.* 619—*Trusts and trustees—Spendthrift trust—Charity—Intestacy—Execution.* **Ellwanger v. Moore,** 234.

2. *Disappearance of legatees—Escheats—Statute of limitations—Act of May* 2, 1889, *P. L.* 66. **Bousquet's Est.,** 534.

LIBEL.

1. *Innuendo—Province of court and jury.* The purpose of an innuendo is to define the defamatory meaning which the plaintiff attaches to the words; to show how they came to have that meaning and how they relate to the plaintiff. But it cannot be used to introduce new matter, or to enlarge the natural meaning of the words, and thereby give to the language a construction which it will not bear.

It is the duty of the court in all cases to determine whether the language used in the objectionable article could fairly and reasonably be construed to have the meaning imputed in the innuendo. If the words are not susceptible of the meaning ascribed to them by the plaintiff and do not sustain the innuendo, the case should not be sent to a jury. **Naulty v. Bulletin Co.,** 128.

LIENS.

1. *Attorney at law—Counsel fees—Remedy at law.* **Quakertown & Eastern R. R. Co. v. Guarantors' Liability Indem. Co.,** 350.

2. *Judgment lien—Decedent's estate—Real estate—Distribution of proceeds of sale.* **Bowman v. Knorr,** 272.

LUNACY.

1. *Bill of exchange—Presentation—Delay—Negligence—Acceptance of notes.* **Aspinall v. Viney,** 383.

2. *Committee—Sale of personal property—Trespass.* Where the committee of a lunatic, pending the traverse of the return of the inquisition, sells personal property belonging to the estate of the lunatic, and subsequently files an account embracing the proceeds of the property, and the account is confirmed, and the balance shown by it distributed and paid out under the report of an auditor and the decree of the court, the alleged lunatic cannot after the finding of the inquisition is reversed, maintain an action of trespass against the committee to recover the value of the personal property sold. **Spaulding v. Bullock,** 224.

3. *Evidence—Lucid intervals.* **Hottle v. Weaver,** 87.

4. *Inquisition—Setting aside inquisition—Title to real estate.* Where a person proposing to purchase real estate finds the record of an inquisition of lunacy against the vendor set aside and vacated for patent illegality, he may safely purchase the real estate, and a subsequent reinstatement of the inquisition will not affect his title. **Mitchell v. Spaulding,** 220.

5. *Sale of real estate—Notice to next of kin.* The Act of June 13, 1836, P. L. 592, gives to the court of common pleas jurisdiction to decree a sale of the real estate of an alleged lunatic after a return of an inquisition finding him to be insane; but no such sale can be decreed unless notice of the intended application is given to the next of kin of the lunatic capable of inheriting the estate. If the next of kin is a minor, some one competent to represent him must be appointed. Service upon the father of the minor, who is not the guardian of the minor, nor of the blood of the alleged lunatic, is insufficient.

Whether a sale of real estate can be authorized while a traverse of the inquisition is pending questioned, but not decided.

A notice of only two days to a party in another state to appear and defend an adverse suit is no notice at all. **Mitchell v. Spaulding,** 220.

6. *Signing of check—Evidence—Province of court and jury.* On an issue to determine whether a person who signed a check had sufficient mental capacity at the time of the signature, three physicians testified that he had been suffering a mental and physical decline for several years from senile paresis, and in their opinion was not competent to transact business at the time he drew the check. They all, however, admitted that the alleged incompetent took care of himself, and went about town attending to all his ordinary business. None of the physicians testified to a single unbusinesslike act on the part of the maker of the check. The testimony as to the mental capacity of the maker was clear and positive. *Held*, that the court below committed

LUNACY—*continued.*

no error in not submitting to the jury the evidence of the maker's mental incapacity. **Central Guarantee Tr. & S. D. Co. v. White,** 611.

MALICIOUS PROSECUTION.

1. *Arrest without information—Boroughs.* **Kossouf v. Knarr,** 146.

MARRIAGE.

1. *Evidence—Legitimacy—Partition.* On a bill for partition where the issue is the marriage of plaintiff's parents, a certificate of marriage is admissible as evidence of identity of parties, when offered in connection with testimony that it was produced from the custody of plaintiff's father and claimed by him as the certificate of his own marriage, and this is the case although the name of plaintiff's father was Sharpe, and the name mentioned in the certificate was Shaw.

On a bill for partition where the plaintiff's legitimacy is denied on the ground of a prior marriage to her mother, a finding in favor of plaintiff will be sustained where the evidence of a previous marriage had opposed to it the evidence of the reception of the parents of the plaintiff by her mother's family as married, the acknowledgment of the husband and the treatment of the plaintiff from her birth as a legitimate child, the entire absence of any appearance or question of the alleged first husband during the whole life of the alleged wife, the possibility of confusion as to two families of the same name, and finally the presumption in favor of innocence of the alleged bigamy. **Dailey v. Frey,** 227.

MARRIED WOMEN.

1. *Powers of—Husband and wife.* **Peter Adams Paper Co. v. Cassard,** 179.

MARTIAL LAW.

1. *Government—Riots—Order of governor.* Martial law exists wherever the military arm of the government is called into service to suppress disorder, and restore the public peace.

Where the governor of the commonwealth issues a general order calling out the militia for the purpose of suppressing violence and maintaining public peace in a district affected by a strike, such an order is a declaration of qualified martial law, in the affected district. It is qualified in that it is put in force only as to the preservation of the public peace and order, and not for the ascertainment or vindication of private rights, or the other ordinary functions of government. For these the courts and other agencies of the law are still open. But within its necessary field, and for the accomplishment of its intended purpose, it is martial law with all its powers.

The resort to the military arm of the government by such an order means that the ordinary civil officers to preserve order are subordinated, and the rule of force under military methods is substituted to whatever extent may be necessary in the discretion of the military commander.

MARTIAL LAW—*continued.*

The effect of martial law is to put into operation the powers and methods vested in the commanding officer by military law. So far as his powers for the preservation of order and security of life and property are concerned there is no limit but the necessities and exigency of the situation. And in this respect there is no difference between a public war and domestic insurrection. What has been called the paramount law of self-defense, common to all countries, has established the rule that whatever force is necessary is also lawful.

While the military are in active service in the suppression of disorder and violence, their rights and obligations as soldiers must be judged by the standard of actual war.

A soldier is bound to obey an order given by his superior officer which does not expressly and clearly show on its face, or in the body thereof, its own illegality, and such order will be a protection to the soldier.

A homicide by a member of the militia called out to suppress disorder, committed without malice in the performance of his supposed duty as a soldier, and under the order of an officer, is excusable, unless it is manifestly beyond the scope of the militiaman's authority, or is such as a man of ordinary understanding would know was illegal.

The governor of the commonwealth issued a general order calling out a division of the militia for the purpose of preserving the public peace in certain counties in which a strike of miners was taking place, and in which tumults, riots and mobs prevailed. The militia was called out, and the general in command placed a corporal's guard at a house which had been attacked with dynamite, and directed the members of the guard, if any attempt was made upon the house, or any person approached the house and failed to halt when directed, to shoot, and shoot to kill. One of the sentries, near midnight, discovered a man approaching the house, and he called upon him four times to halt. The man disobeyed the order, and the sentry shot and killed him. These facts were undisputed. The sentry was subsequently arrested on a warrant, but on habeas corpus proceedings in the Supreme Court, was released on bail. *Held*, that the relator should be discharged, inasmuch as the evidence against him failed to show a prima facie case. **Com. v. Shortall,** 165.

MASTER.

1. *Equity practice—Equity rules—Corporation—Elections.* **Yetter v. Del. Val. R. R. Co.,** 485.

2. *Partition—Agreement of parties.* **Black v. Black,** 116.

MASTER AND SERVANT.

1. *Negligence—Elevator.* **Baldwin v. Urner,** 459.

2. *Negligence—Railroads—Evidence—Explosion of locomotive—Fellow-servant—Fireman—Boiler inspector.* **Marsh v. Lehigh Val. R. R. Co.,** 558.

MASTER AND SERVANT—*continued.*

3. *Negligence—Railroads—Fellow-servant—Act of April* 4, 1868, *P. L.* 58. **Keck v. Phila. & R. R. R.,** 501.

4. *Negligence—Safe place—Proximate cause—Fellow-servant—Vice principal—Contributory negligence—Question for jury.* **Butterman v. McClintic-Marshall Construction Co.,** 82.

5. *Negligence—Scaffolding.* **Geist v. Rapp,** 411.

6. *Payment—Presumption—Housekeeper.* The rule that there is a presumption that domestics are regularly paid, weekly, biweekly or monthly, according to the custom of the locality in which they render services to their employers, has no application when the head of the house assumes relations of intimacy with his servant, and takes a girl employed by him out riding, and by what he says and does indicates an intention to marry her. In such a case, the strict rule, applicable to purely business relations, cannot be invoked by the master, for the intimacy of his personal relations with his servant necessarily involves him in laxity in his business relations with her. **Schrader v. Beatty,** 184.

MECHANICS' LIENS.

1. *Agreement not to file lien—Consideration.* An agreement by a subcontractor not to file a mechanic's lien is a sufficient consideration to support a promise on the part of the owner to pay the amount of the subcontractor's claim. **Culver v. Pocono Spring Water Ice Co.,** 481.

2. *Oil and gas wells—Act of June* 17, 1887, *P. L.* 409—*Labor—Materials—Leasehold.* (1) A claim filed under the act of June 17, 1887, "for materials delivered and labor furnished" is invalid, as the act only provides a lien for labor; (2) a claim filed against "all that certain lot or piece of ground with the factory building . . . . improvements thereon, and the curtilage appurtenant thereto," is invalid, inasmuch as the intent of the act was to give a lien only against a tenant's interest in severable machinery on the land; (3) a claim against all the machinery on the premises is invalid, inasmuch as the act gives a lien against machinery only on which construction work was done.

It seems probable that the act is applicable only to oil or gas leases or similar mineral and mining rights in land.

Not decided whether a claim filed "for materials delivered and labor furnished" is invalid as to labor furnished. **James Smith Woolen Mach. Co. v. Browne,** 543.

MINES AND MINING.

1. *Lease—Royalties.* A mining lease gave to the lessee the right to mine all the merchantable coal to exhaustion, accompanied with certain surface and timber privileges on the lessor's land. No fixed term was specified. One clause of the lease provided for the payment of thirty cents per ton for the coal mined and removed. By a subsequent clause the same rate per ton was fixed, but the lessee agreed to pay during the remainder of the term "a fixed minimum cash royalty

MINES AND MINING—*continued.*

annually of thirty thousand dollars in quarterly installments, and for such payment may mine and remove in each and every year as aforesaid one hundred thousand tons of coal." *Held*, that the lessee was bound to continue the payment of the stipulated minimum royalty as long as any coal remained unmined, although he may have paid an amount in excess of thirty cents per ton for all the coal under the land both mined and unmined. In such a case the lessee's loss was caused by his own delay. Lehigh & Wilkes-Barre Coal Co. v. Wright, 177 Pa. 387, followed. **Lehigh Val. Coal Co. v. Everhart,** 118.

2. *Taxation—Capital stock of corporation—Coal on hand.* **Com. v. Del. Lack. & Western R. R. Co.,** 645.

MISTAKE.

1. *Equity—Ignorance of the law—Ground rents—Agreement as to reduction of rent—Remedy at law.* **Norris v. Crowe,** 438.

2. *Of fact—Equity—Evidence—Auditor—Finding of fact—Review—Statute of limitations.* **Ridgway's Account,** 587.

MORTGAGES.

1. *Deed—Reconveyance—Time—Agreement as to time—Time as essence of contract.* **Svenson v. Rohrer,** 407.

2. *Defense—Contract.* In an action upon a mortgage it appeared that prior to the date of the mortgage, the mortgagee had contracted to furnish mill work to the mortgagor. The plaintiff, a manufacturing company, agreed with the mortgagee to manufacture and deliver to him the mill work. The mortgagor defaulted in the payments to the mortgagee, and the latter to the plaintiff. The three parties came together and entered into an agreement in writing by which the mortgagor agreed to give the mortgage in suit to the mortgagee, and the latter agreed to assign it forthwith to plaintiff. The mortgagor also agreed to give security for the balance of mill work to be furnished under the original contract between the mortgagee and himself. The plaintiff agreed to discontinue a suit which it had begun against the mortgagee. *Held*, that under the agreement the plaintiff was under no contractual obligation to supply the balance of mill work to the mortgagor, and that a failure to do so was no defense to the mortgage. **Krimm v. Devlin,** 508.

3. *Equity jurisdiction—Remedy at law—Corporations—Suit against trustee.* **Sprigg v. Com. Title Ins. & Tr. Co.,** 548.

4. *Execution—Defeasance.* **Eberly v. Shirk,** 414.

MUNICIPAL LAW.

1. *Building laws—Fire ordinance—Wooden buildings—Reconstruction.* A city ordinance providing that within certain limits "no building shall hereafter be constructed or reconstructed, except of brick, stone, iron, or other incombustible material" does not apply to changes in a wooden building which involve a new front of galvanized iron, a ceiling and wainscoting of steel, a roof of slate in place of wooden shingles, and an increase of height of two feet and six inches without any increase of length or width. **Contas v. Bradford,** 291.

MUNICIPAL LAW—*continued.*

2. *Gas companies—Refusal to supply gas—Measure of damages.* **Miller v. Wilkes-Barre Gas Co.,** 254.

3. *Indebtedness—Special tax levy—Judgment.* Judgments in the common pleas or on the docket of a justice of the peace against a township are, in the absence of jurisdictional defects conclusive, and cannot be attacked in a collateral proceeding in the court of quarter sessions to compel the levy of a special tax to pay the judgments. **Plains Township's Appeal,** 556.

4. *Municipal consent—Street railways—Lease—Traction company—Condition—Guard wires.* **Conshohocken Boro. v. Conshohocken Ry. Co.,** 75.

5. *Municipal contracts—Decision of director of department of public works.* Where a municipal contract provides that the decision of the director of the department of public works shall be final, conclusive and binding upon all parties, and the director signs and approves an estimate for the work done and materials furnished by the contractor, the estimate is conclusive upon the controller of the city, and he has no discretion to refuse to pay it. In mandamus proceedings against the controller to compel payment, he cannot successfully allege as a ground for refusal that the work was not done according to the contract; that it was improperly done in certain respects; that the doing of the work in the improper manner by the contractor was intentional, and that the director had notice of this before he approved of the work, but approved it notwithstanding. **Com. v. Pittsburg,** 379.

6. *Philadelphia—Public officers—Accounts—Audit—Act of June* 1, 1885. Under the act of June 1, 1885, relating to the government of the city of Philadelphia, it is the duty of the controller of the city to audit the accounts of the health officer, and in the absence of gross fraud practiced upon the controller, or collusion between him and the accounting officer, his official audit is conclusive upon the city, and this is the case although the audit may not have been actually filed in the court of common pleas as provided by the act.

The fact that a public officer has not objected to a reaudit of his accounts for certain years by the controller, will in no way estop him from objecting to another audit of the same years by a new controller. **Com. v. Patterson,** 522.

7. *Prisons—Sheriff—Board of prisoners—County—Erie county.* **Burton v. Erie Co.,** 570.

8. *Street railways—Paving.* **Shamokin Boro. v. Shamokin & Mt. Carmel Elec. Ry. Co.,** 625.

9. *Subcontractor's bonds—Waiver—Evidence.* A corporation plaintiff will not be deemed to have waived the benefit of ordinance of the city of Philadelphia of March 30, 1896, providing for bonds by contractors for the protection of subcontractors, by evidence which at the most amounts only to the expression of an opinion by an officer of the company that they did not think themselves within the bond as they had sold the material on the credit of the contractor.

Not decided whether the protection of the bond may be waived without the city's consent.

In an action by a material man on a bond given under the ordinance

MUNICIPAL LAW—*continued.*

of March 30, 1896, the claim of the plaintiff is brought within the terms of the bond by proof of the sale and delivery of bricks to the contractor, and the latter's use of them in paving under his contract with the city. The fact that the contractor, desiring to make his bid to the city for the work intelligently, agreed with the plaintiff on the price of the bricks sometime before his contract with the city was actually made, does not vary the case, if the sale itself is not made until after the contract. **Phila. v. Neill,** 333.

10. *Telegraph and telephone companies—Laches—Estoppel—Equity.* **Bradford v. N. Y. & Penna. Telep. & Teleg. Co.,** 582.

MUNICIPAL LIENS.

1. *Scire facias sur municipal claims—Appeals—Practice, Supreme Court—Interlocutory order—Act of June* 4, 1901, *P. L.* 364. **Phila. v. Pemberton,** 73.

MURDER, see Criminal Law.

NEGLIGENCE.

1. *City—Defect in highway—Province of court and jury.* In an action by a widow against a city to recover damages for the death of her husband, the evidence for the plaintiff tended to show that the deceased was thrown from his wagon by a jolt, or by the wheel of the wagon slipping into a hole or rut beside a railway track. The evidence for the defendant tended to show that the wheel had caught in the frog of the railroad track and given the wagon a sudden twist. *Held*, that the case was for the jury. **Behl v. Phila.,** 329.

2. *Contributory negligence—Charge of court—Harmless error.* In an accident case it is improper for the court to instruct the jury that the plaintiff cannot recover unless he proved that he was in nowise guilty of any negligence that contributed to the injury. Such an instruction imposes upon the plaintiff the burden of showing affirmatively that he was not guilty of contributory negligence. This is more than he was required to do. It is sufficient that his own evidence does not disclose any contributory negligence. A judgment, however, will not be reversed for such error where it appears that the court subsequently gave full, ample and proper instructions, so that the jury could not have been misled.

The general effect of the charge of the court, rather than a casual expression of it must govern the interpretation or construction of it.

It is improper to assign as error the entire charge of the court without pointing out specific errors.

While the trial judge may not decide a disputed question of fact when the averments of the parties in its support or denial are sustained by reasonable proof, he may express his opinion respecting the evidence, and at times it is his duty to do so. **Fitzpatrick v. Union Trac. Co.,** 335.

3. *Contributory negligence—Question for jury.* Where in an action to recover damages for the death of a person killed by a collision of cars, the question of the deceased's contributory negligence depends

NEGLIGENCE—*continued.*

upon his position at the time of the collision, and the evidence as to where he was, is conflicting, the case must be submitted to the jury. **Butterman v. McClintic-Marshall Construction Co.,** 82.

4. *County—Repair of county bridge.* Where a county is about to repair a county bridge, it is not negligence per se to regularly and carefully pile plank on the bridge, leaving ample room for two two-horse teams to pass immediately opposite the pile, and leaving the pile there from the beginning of May 29, to remain over Decoration Day until the following morning May 31, if the plank is necessary for the repairs in hand. **Karl v. Juniata Co.,** 633.

5. *County bridge—Defective eyesight—Charge.* In an action against a county to recover damages for personal injuries sustained on a county bridge, where there is evidence that the eyesight of plaintiff was defective, it is not improper for the court to affirm a point as follows: "That if the jury believe from the evidence that the eyesight of the plaintiff was impaired on the night of the accident, the law required a degree of care upon his part beyond the usual and ordinary, proportioned to the degree of his impairment of vision, and if he failed to exercise the proper degree of care under the circumstances, he was guilty of contributory negligence and the verdict must be for the defendant." **Karl v. Juniata Co.,** 633.

6. *Damages—Carlisle tables.* In an accident case where the Carlisle tables are admitted to show the expectancy of life of the plaintiff, the court must carefully guard the effect of the evidence by directing the attention of the jury to the circumstances affecting the duration of the life in question. It is not sufficient to say that the tables are some aid, but not conclusive in determining the probable life of the plaintiff. All the circumstances affecting the probable duration of the plaintiff's life as disclosed by the evidence or concerning which there is testimony, should be called to the attention of the jury. **Seifred v. Penna. R. R. Co.,** 399.

7. *Death—Parent and child—Adult son—Evidence.* In an action by a mother to recover damages for the death of her adult son, where the statement of claims shows the relation between the plaintiff and the deceased, the plaintiff may show what loss pecuniarily she had sustained in the death of her son. **Blauvelt v. Del. Lack. & W. R. R. Co.,** 141.

8. *Electric light companies—Presumption.* In an action against an electric light company to recover damages for the death of plaintiff's husband, it appeared that the deceased on the evening of the accident attempted to turn on an incandescent electric light in his barroom, and immediately received a severe shock which knocked him down. In falling he carried the glass bulb with him. He immediately sprang up saying, "What is that?" put the bulb to the socket and received a shock which killed him. The evidence showed that at another house 200 feet distant, and on the same incandescent circuit, the occupant on the same evening received a severe shock from an incandescent light. It also appeared that at the latter place on the night in question some arc wire was stripped of insulation and had come in contact with the incandescent wire. There was no evidence, however,

NEGLIGENCE—*continued.*

that the contact with the naked arc wire would produce any dangerous effect at the house of the deceased. The evidence also showed that the deceased had been a customer of the defendant company, but that the defendant company prior to the accident had leased and transferred its property and contracts, including the contract of deceased, to another electric light, heat and power company. *Held*, that it was not error to give binding instructions for the defendant. **Crowe v. Nanticoke Lt. Co.,** 374.

9. *Evidence—Damages—Permanent injury—Ability.* In an accident case, where a physician has testified to the permanent character of an injury, he may be properly asked whether the injury will affect the plaintiff's ability to perform labor. **Palmer v. Warren St. Ry. Co.,** 574.

10. *Evidence—Opinion of witnesses—Grade crossing.* In an action against a railroad company to recover damages for personal injuries sustained at a grade crossing it is error to admit the opinion of witnesses to show that the crossing was dangerous, where the facts disclosed by the evidence give an intelligent description of the situation. In such a case the jury have before them all that is necessary to enable them to form an opinion themselves as to the character of the crossing. **Seifred v. Penna. R. R. Co.,** 399.

11. *Evidence—Witness—Cross-examination—Injuries—Street railways—Damages—Wages.* **Glenn v. Phila. & West Chester Trac. Co.,** 135.

12. *Extent of injuries—Question for jury.* In an action to recover for personal injuries received by the firemen of a traction engine, caused by the engine breaking through a bridge and precipitating itself and him into a stream some distance below, the questions as to whether or not hemorrhages of the stomach, with which he suffered three months after the accident, and his physical condition at the time of the trial, were the direct consequences of his injuries by the accident, are for the jury. **Smith v. Muncy Creek Twp.,** 7.

13. *Hole in sidewalk—Contributory negligence—Province of court and jury.* Persons walking on city streets are bound to use their eyes and watch where they are going, and failure to do so will defeat a recovery for injuries, that could have been avoided by the exercise of this reasonable care.

In an action against a water company to recover damages for personal injuries, it appeared that the plaintiff, a woman, was injured by falling into a hole twenty-four inches in diameter and six feet deep, that had been dug in the pavement of a city street by direction of the defendant. The hole was located almost directly in front of steps that led to the office of a cold storage house, and twenty inches of its diameter were in the sidewalk. In digging the dirt had been thrown into the street and there was nothing on the surface of the pavement to indicate that the hole was there. It was dug in the morning and left unguarded; the accident occurred in the middle of the afternoon. At this part of the street the distance between the curb and the building line was ten feet, but of this space only four feet nearest the curb line were paved. On the remaining space was a

grass plot extending from the west end of the storage house to the office steps, crossed near the middle by a walk leading from the pavement to the engine room. The plaintiff and another woman went together to the storage house on business. They came on the street by way of an alley at the west end of the building, but turned to the east before they reached the pavement and walked on the grass plot to the engine room door. They saw the engineer sitting on the office steps, and walked on to the end of the plot to the paved way leading from the steps to the pavement. Here they stood a short time facing the building and talking to the engineer. Then they turned to the right to go further east on the pavement. In turning the plaintiff took one step backward and sideways, and fell into the hole. Both women wore sunbonnets, which obstructed a side view. Neither of them had seen the hole, nor anything that would indicate that the pavement was unsafe. *Held*, (1) that it was for the jury to say whether the plaintiff was guilty of contributory negligence in taking the step backward without first looking behind her; (2) that it was for the jury to determine whether the defendant was negligent in leaving the hole unguarded.

It is only in clear cases where the facts and the inferences to be drawn from them are free from doubt that the court is warranted in saying that there was contributory negligence. **Iseminger v. York Haven Water & Power Co.,** 591.

14. *Ice on pavement—Question for jury.* It is not necessarily negligence to attempt to pass over even a "noticeable accumulation" of ice on a pavement. That may depend on the size and shape of the accumulation, the obviousness and magnitude of the danger, the means at hand of avoiding it, and other circumstances.

In an action by a woman to recover damages for personal injuries sustained by a fall on an accumulation of ice on a pavement, where it appears that the plaintiff had passed over the obstruction safely the evening before, the question whether it was prudent in her to try to do so again is for the jury.

In such a case the plaintiff is not bound affirmatively to disprove negligence. It is sufficient for her to make out a case of injury from negligence of the defendant without disclosing negligence on her own part. Whether she used due care under the circumstances is for the jury.

In such a case if the evidence shows "a generally slippery condition of the pavements" it is impossible for a pedestrian to avoid some risk if she travels them at all; whether she used due care under the circumstances is for the jury. **Brown v. White,** 106.

15. *Joint tort feasors—Action.* In a suit for a joint tort there can be no recovery upon proof of one or more separate torts. When a joint tort is charged a joint tort must be proved in order to sustain the action. The allegation and the proof must agree in cases of tort as in other cases.

An action against a township and a street railway company to recover damages for personal injuries sustained by the alleged dangerous and unsafe condition of a public road and the railway tracks

NEGLIGENCE—*continued.*

thereon, cannot be maintained where neither under the facts as set forth in the statement of claim, nor as shown upon the trial, was there any concert of action between the township and the railway company. **Goodman v. Coal Twp.,** 621.

16. *Master and servant—Elevator.* An employer is not held up to the very highest standard of care; only to reasonable care in view of the circumstance.

In an action to recover damages for injuries to a boy eighteen years old, it appeared that the plaintiff was employed by defendant to work at some knitting machines in a room through the floor of which an elevator passed. When the elevator was lifted to the floor two doors opened automatically and rested against upright posts, one on each side of the elevator shaft. When the cage descended the automatic doors closed, and formed part of the floor. One of the upright posts was next to the wall of the building. **Baldwin v. Urner,** 459.

17. *Master and servant—Fellow-servant—Vice principal.* Where a construction company employs a person to superintend the erection of a plant, and no official of the company takes any part in the work, and the superintendent hires and discharges men and directs how and where they shall work, the superintendent is a vice principal, and if he is negligent in not providing suitable machinery and a suitable place to work, his employer will be liable to workmen for any resulting accident. **Butterman v. Clintic-Marshall Construction Co.,** 82.

18. *Master and servant—Safe place—Proximate cause.* A construction company, engaged in building a plant for a steel company, used jointly with the latter a siding with a down grade, and erected alongside of it a pole to aid in the unloading of cars. The pole was secured by guy ropes to the tracks in such a way that a car passing over the tracks would strike the ropes. The employees of the steel company permitted cars to get beyond their control on the down grade and run into the cars of the construction company, causing them to strike and break the rope, and let down the pole which struck one of the construction company's workmen and killed him. In an action by the widow of the deceased against the construction company to recover damages for his death, *held*, (1) that as an accident was inevitable if the rope should be struck by a moving car, it was the construction company's duty to foresee that cars might get beyond control and to provide for such a contingency; (2) that the defendant had not provided safe machinery or a safe place to work for its employees; (3) that a verdict and judgment for the plaintiff should be sustained. **Butterman v. McClintic-Marshall Construction Co.,** 82.

19. *Master and servant—Scaffolding.* In an action against an employer to recover damages for the death of an employee by the fall of a scaffolding on which the deceased worked, there was testimony that the scaffold was built in an unusual manner with insufficient planks and insufficient nails, and that for that reason it was not capable of bearing safely the weight that would be put upon it. The evidence of experienced carpenters was conflicting as to whether the defective

NEGLIGENCE—*continued.*

construction was so manifest that the deceased should have seen it. *Held*, that the case was for the jury. **Geist v. Rapp,** 411.

20. *Physicians—Malpractice.* In an action against a physician for negligence in failing to use a tourniquet after an accident, a nonsuit was properly entered where there is no evidence at all from any witness competent to express an opinion that a tourniquet should have been used, or that a tight bandage applied by defendant was not fully equivalent. **De Long v. Delaney,** 226.

21. *Province of court and jury.* The definition of negligence and the determination of a standard of duty is always a matter of law for the court. In case of dispute it is for the jury to say whether the facts come within the standard. Where the facts are clear and nothing remains but the definition and application to them of the rule of conduct, the responsibility is upon the court alone. **Custer v. Balto. & O. R. R. Co.,** 529.

22. *Railroad—Bridge—Province of court and jury.* A railroad company owned a covered bridge 800 feet long. At the side of the track was a wagon road used by the public on the payment of tolls, but so close to the track that a train and a wagon could not safely pass at the same time. On the approach to the covered portion of the bridge the space between the side of the cars and the wheels of wagons was only three or four feet. A safety gate was placed at the land end of the approach. The gate was lowered when the bridge was in use for the passage of trains, and raised when the gate was opened to the public. The driver of a wagon who knew the rules as to the gate, having paid toll and finding the gate raised drove on the approach. After a time he was stopped by a line of wagons which had been halted near the end of the bridge. This was caused by the derailment of some cars on a train that was being pushed across the bridge in the direction in which the driver was going. At the time the driver stopped, this train had been cut in two and a locomotive with tender in front was drawing a portion of the train back towards the driver at the rate of eight to nine miles an hour. The driver testified that when he stopped, he got off the wagon and stood on the tracks, and then for the first time saw the train. He was not able to extricate himself, and he was injured in the attempt to hold his horses. *Held*, in an action against the railroad company to recover damages for the injuries, that the case was for the jury. **Sutliff v. Penna. R. R. Co.,** 267.

23. *Railroad—Broken rail—Rotten ties—Evidence.* In an action against a railroad company to recover damages for the death of one of its conductors, caused by a broken rail, the court commits no error in refusing to submit the case to the jury, where the plaintiff's theory that the break was caused by a rotten tie is not supported by any definite testimony that the ties were rotten at the place of the break.

In such a case it is not error for the court to refuse to permit the plaintiff to show that the defendant company had allowed its roadbed and its rails to fall into bad repair generally, and at places other than that of the accident. O'Donnell v. Allegheny Valley R. R. Co., 59

NEGLIGENCE—*continued.*

Pa. 239, distinguished. **Briggs v. E. Broad Top R. R. & Coal Co.,** 564

24. *Railroads—Crossing—"Stop, look and listen."* In a grade crossing accident case, although the weight of testimony on the question whether proper notice was given of the approach of the train at the crossing may be with the defendant, yet the case must be submitted to the jury if three witnesses for plaintiff testify that they were listening for some signal by bell or whistle of the approach of the train, and heard none. Such testimony is more than a scintilla, and of a higher grade than merely negative testimony.

In an action against a railroad company to recover damages for personal injuries, it appeared that plaintiff with two companions was going to his work at six o'clock in the morning in the early part of February. This was before daylight, and a snowstorm of unusual force and severity was prevailing. The temperature was six degrees above zero, and the wind was blowing at the rate of thirty miles an hour. Several inches of snow had fallen, drifts had formed on the sidewalks, and the men were walking in the middle of the street. When they reached the crossing of defendants' road in a populous part of a city, they stopped within five feet of the track and looked both ways, and listened for the sound of a bell or whistle. They heard neither and walked on the single track, and the plaintiff was struck by an engine which was running thirty-five or forty miles an hour on a down grade with the steam off. The headlight of the engine was to some extent obscured by the snow that clung to the glass, and by snow in the surrounding atmosphere. At the place where the men stopped, an engine could be seen in daylight under ordinary circumstances when 1,500 feet away. *Held*, that the question of contributory negligence of the plaintiff was for the jury. **Kuntz v. N. Y. C. & St. L. R. R. Co.,** 162.

25. *Railroad—Crossing—"Stop, look and listen."* In an action against a railroad company to recover damages for personal injuries, the evidence for the plaintiff showed that prior to the accident he went to defendant's station, loaded two trunks upon his wagon, which had a covered seat, and started away. He drove along the highway for a distance of about 200 feet parallel with the railroad, being separated from it by a platform about eleven feet wide and three feet high. The highway crossed the track at a point about fifty feet from the end of the platform. After driving this distance, about 200 feet in all, parallel with the railroad, plaintiff turned his horse to the left, and drove towards the track intending to cross. Just then a fast train passed, and the horse was struck either by reason of having been driven too close to the track, or because in its fright it moved close enough to be struck by the passing train. The horse was killed and the plaintiff was injured. At the station plaintiff could see down the track for nearly a mile in the direction from which the train came. Plaintiff did not look down the track as he turned towards the crossing. *Held*, that the court below committed no error in entering a nonsuit, and refusing to take it off. **Fleschhut v. Lehigh Val. R. R. Co.,** 348.

NEGLIGENCE—*continued.*

26. *Railroads—Grade crossing—Duty as to flagman.* On running its trains over a crossing, a railroad company must exercise the care required by all the circumstances, and the failure to perform this duty is negligence. It must adopt and use some means for the protection of those who may be crossing its tracks at their intersection with a public highway. But what particular means shall be used to protect the public when using the crossing with due care is left to the railroad company which operates the road, the law merely demanding and requiring reasonable care in view of all the circumstances.

It is not negligence per se for a railroad company not to guard a crossing with a flagman or watchman. It is only one of the elements to be considered with others in determining whether the company is negligent. **Seifred v. Penna. R. R. Co.,** 399.

27. *Railroads—Grade crossing—"Stop, look and listen"—Evidence—Presumption.* In an action to recover damages for the death of a man killed while riding a horse over a grade crossing on a dark night, without any witnesses of the accident, the case is for the jury where the evidence for the plaintiff, although contradicted, tends to show that the night was so dark that the engine approaching the crossing running backward could not be seen; that it gave no warning by whistle or bell of its approach; that it carried no lights; that it could not be seen by a person approaching the crossing, and that it ran so noiselessly that it could not be heard by any one on the highway as he came to the crossing.

In such a case the presumption is that the deceased did his duty as he approached the crossing by stopping, looking and listening. **Blauvelt v. Del., Lack. & W. R. R. Co.,** 141.

28. *Railroads—Master and servant—Evidence—Explosion of locomotive.* While an employer owes his employee the duty of furnishing such machinery and appliances as, in the ordinary uses of the business engaged in, are safe and suitable and of keeping them in such condition, a verdict and judgment cannot be entered against him at the suit of an injured servant on a guess that he was negligent or on a mere theory of specific negligence without proof to sustain it. Specific negligence must be shown by competent testimony before the question of liability can go to a jury, who, in no case or controversy, are to be guessers, but, in all, sworn triers of facts, upon evidence submitted to them.

In an action to recover damages from a railroad company for the death of a locomotive fireman, it appeared that the death was caused by the explosion of the boiler of a locomotive upon which the deceased was working. After the explosion parts of the boiler were varnished to preserve them, and they were stored away by the railroad company. When the case was called for trial the defendant presented to the court an affidavit stating that the portions of the boiler preserved were in the same condition as they were in immediately after the explosion, and that to properly understand the case the jury should view the boiler. Two experts for the plaintiff who examined the parts of the boiler preserved, testified that the iron was in poor condition, thin and worn, unsafe, rotted, wasted away and corroded; that it had wasted

NEGLIGENCE—*continued.*

away from its original thickness of three eighths of an inch to one eighth of an inch, and was not thicker than a knife blade. One of the experts stated that in his judgment the explosion was caused by the unsafe condition of the boiler. *Held*, that the evidence was sufficient to submit to the jury on the question of defendant's negligence. **Marsh v. Lehigh Val. R. R. Co.,** 558.

29. *Railroads—Master and servant—Fellow-servant—Act of April* 4, 1868, *P. L.* 58. Independently of the Act of April 4, 1868, P. L. 58, a railroad company was liable to the employees of another railroad company for negligence, just as to any other strangers, the general similarity and aims of the duties not being sufficient to bring them within the rule as to the risks of a common employment. The general effect of the act was to make three classes of persons, employees, quasi employees under the act and strangers.

Where the same track is used by two railroad companies, it must be considered for the application of the Act of April 4, 1868, P. L. 58, as the property of each while using it; and it is immaterial whether the use be by virtue of joint or several ownership, charter right, license or traffic agreement.

To bring a case within the second class distinguished in Spisak v. B. & O. R. R. Co., 152 Pa. 281, namely those where the employment is ordinarily the duty of railroad employees, the plaintiff must not only be engaged in such work but also be so engaged for or upon the property of the railroad by whose negligence he is injured.

In such cases the employees of each road accept the risk of their employment in regard to their own road but not those incident to the operation of the other road unless at the time engaged in some work for the other or for both roads jointly.

A locomotive engineer engaged in running a train of his own company over tracks of another company which his own company had permission to use, is not within the provision of the act of April 4, 1868, if he is killed by the negligence of employees of the other company. **Keck v. Phila. & R. R. R.,** 501.

30. *Railroads—Master and servant—Fellow-servant—Fireman—Boiler inspector.* A boiler inspector of a railroad is not a fellow-servant of a locomotive fireman. **Marsh v. Lehigh Val. R. R. Co.,** 558.

31. *Railroad—Speed of train—Crossing.* There is no limit to the rate of speed at which a railroad company may run its train through the open country and over the crossings of country roads, so long as the bounds of safety to patrons are not transgressed.

In cities, towns and populous districts the speed of trains must be moderated, or else the railroad must take reasonable precautions to make it safe for the public who have occasion to cross its tracks.

Where a railroad has placed gates across a highway and has stationed a watchman there, to protect travelers on the highway, it may run its trains at high speed at that point, even if it be within the limits of a municipality or in a populous district.

In an action against a railroad company to recover damages for the destruction of two horses and a wagon, the evidence is insufficient to submit to the jury which is in effect that plaintiff's team in attempt-

NEGLIGENCE—*continued.*

ing to pass over a grade crossing in a populous suburb became stalled on the tracks of the railroad by reason of snow and ice on the planking; that before the horses could be unhitched a train running at the schedule rate of sixty miles per hour reached the crossing and killed the horses; that an effort was made by the employees of the railroad to give notice to the approaching train by dispatching a man towards it with a red flag; that the crossing could be seen at a distance of some 4,400 feet looking through a tunnel, and that a block signal about seventy-five feet beyond the crossing was set to hold the train, but that the engineer was unable to stop the train after seeing the signal before the point of collision; that the crossing was protected by gates in charge of a gateman; that no complaint was made of the gates or of the gateman, and that the wagon had ample time to make the crossing before the approach of the train had it not been stalled in the manner described. **Custer v. Balto. & O. R. R. Co.,** 529.

32. *Railroads—"Stop, look and listen"—Grade crossing.* In an action against a railroad company to recover damages for personal injuries sustained while plaintiff was driving over a grade crossing, the plaintiff testified that he stopped at a point between sixty and seventy feet from the track, and that this point "was the best place I could get to look through." The view eastward from which the train approached was somewhat obstructed, but he said that at that point there was an open space of sixty feet through which he could see in an easterly direction the railroad tracks. He testified, "I looked out through there, and there was nothing to be seen ahead of me, and I thought I could drive across." He had passed safely over two tracks and his horse went beyond the third track when his vehicle was struck and he was injured. *Held*, that the question of plaintiff's contributory negligence was for the jury. **Seifred v. Penna. R. R. Co.,** 399.

33. *Railroads—Tracks in street.* Where the tracks of a steam railroad are laid in a public street, the driver of a wagon lawfully using the track in front of an approaching train, while it is his duty to give way and not obstruct its progress, is entitled to reasonable warning and reasonable time to get out of the way. The employees of the railroad are bound to keep the train under control and have no right to run into the traveler either upon the track or while in the act of leaving it. They are bound to use every reasonable effort to avoid a collision.

In an action against a railroad company to recover damages for personal injuries, it appeared that the railroad company occupied a portion of the street with a track laid in the same manner as street car tracks, and paved in with Belgian blocks. There were two street car tracks also on the street. The whole street was used by the public. The plaintiff while driving a heavily loaded wagon was forced by reason of street cars on the trolley tracks and wagons on one side of the street to turn his wagon, so as to drive for a distance of about 140 feet with one wheel of his wagon between the rails of the railroad track. He drove in this way about four minutes, and was beginning to turn back towards the trolley track when his wagon was struck in the rear by a locomotive. *Held*, that the question of plaintiff's contributory

NEGLIGENCE—*continued.*
negligence and defendant's negligence was for the jury. **Holt v. Penna. R. R. Co.,** 356.

34. *Street railway companies—Passenger on running board of car—Sudden jerk.* Where a passenger on an open summer electric street car, when it is approaching a crossing where he intends to get off, of his own motion leaves his seat and steps down on the running board of the car, holding the rail with his left hand and having in his right a bag containing tools, and while in this position the car stops, with a sudden and violent jerk, and he is thrown off and injured, his contributory negligence is a bar to the recovery of damages.

Where a passenger on an electric street car leaves his seat where he he is safe, and steps down on the running board of the car, and remains there while it is in motion, he voluntarily puts himself in a place of danger and takes upon himself the risk of his position from any cause. **Bainbridge v. Union Trac. Co.,** 71.

35. *Street railways—Crossings—"Stop, look and listen"—Motormen.* The rule that persons about to cross a street railway must not only look when first entering the street, but must continue to look until the track is reached, applies to motormen upon street cars; and if a motorman is injured by failure to observe this rule he cannot recover from the street railway company, and this is the case although the car which he is operating may have the right of way over the car with which he collides.

The motorman first reaching a street crossing with his car may not go on and by casting the whole burden of care on the other imperil the property of the company and the lives of the passengers in his car. **Robb v. Union Trac. Co.,** 265.

36. *Street railways—Injury to passenger—Contributory negligence.* Where a passenger on an open summer electric car signals the conductor to stop at a crossing both before the car had reached the crossing and after it had passed the crossing, and the conductor either does not see or heed the signals, and the passenger then rises and stands at the extreme edge of the car with his face to the rear and his arm around a stanchion, and again signals the conductor when the car is well within the block, and the car is then suddenly stopped with a jar, and the passenger is thrown out and injured, the latter is not entitled to recover damages from the railroad company for his injuries. In such a case it is not the negligence of the company, but the contributory negligence of the passenger which caused the accident. **Jennings v. Union Trac. Co.,** 31.

37. *Street railways—Measure of care—Carriers—Passengers.* The utmost care and vigilance is required on the part of the carrier. This rule does not require the utmost degree of care which the human mind is capable of imagining, but it does require that the highest degree of practical care and diligence should be adopted that is consistent with the mode of transportation adopted. Railway passenger carriers are bound to use all reasonable precautions against injury of passengers; and these precautions are to be measured by those in known use in the same business which have been proved by experience to be the most efficacious.

NEGLIGENCE—*continued.*

It is not negligence on the part of a street railway company to run two cars towards each other on the same track. **Palmer v. Warren St. Ry. Co.,** 574.

38. *Street railways—Passenger—Presumption—Collision.* The case of a passenger injured by a collision between two street cars of the same company is within the unbending rule applicable to railroad and passenger railway companies alike, that where a passenger on a car is injured without fault of his own, there is a legal presumption of negligence, casting upon the carrier the onus of rebutting it; and it is immaterial that the collision was not due to any defect in the car on which the plaintiff was riding or the machinery connected with it, but to a broken appliance on the car that ran into it. **Palmer v. Warren St. Ry. Co.,** 574.

39. *Street railways—Passenger—Presumption—Jumping from car.* A well grounded fear that a collision is about to take place which will result in fatal or even serious injury to a passenger, is a justification to him to leap from the car, and the presumption of the common carrier's negligence is not confined to the case of injuries resulting from actual collision, but extends to those caused by an effort to escape it, when made on a well grounded belief that it will occur. **Palmer v. Warren St. Ry. Co.,** 574.

40. *Township—Defective bridge.* Township supervisors owe a duty of inspection to bridges under their control, and deterioration of the timbers of a bridge should have been known to the supervisors where it appears that the floor timbers of a bridge had not been renewed for fifty-five years. **Smith v. Muncy Creek Twp.,** 7.

41. *Townships—Defective bridge—Traction engines.* Township supervisors having knowledge that the use of traction engines in the township had become general and that their transportation had been for many years an ordinary use of the roads of the township, should provide against dangers from this ordinary and reasonable use of the township bridges. **Smith v. Muncy Creek Twp.,** 7.

42. *Unguarded elevator shaft—Province of court and jury—Evidence.* In an action against the owners of a store by a customer to recover damages for injuries sustained by falling into an unguarded elevator shaft, it appeared that on the day of the accident plaintiff went to the store to purchase an article of which he had a sample. He showed the sample to a salesman, who after examining it said: "I think we have a piece like that in the back room. We will go and see." He then turned and walked into a storage room through which it was necessary to go to reach the back room. Plaintiff followed the salesman. The room was so dark that he lost sight of the salesman, but followed what he supposed to be the sound of his footsteps to the other end of the room, where he fell into the unguarded elevator shaft. There was testimony that it was not unusual for customers of the store to walk through this room in order to reach the back-room. *Held*, that the case was for the jury and that a judgment and verdict for plaintiff should be sustained.

In such a case where one of the defendants testified that he did not consider the place dangerous, it was not error to allow him to be asked

NEGLIGENCE—*continued.*

or cross-examination whether other persons had not fallen down the elevator shaft before. Such question was proper to show his knowledge of the dangers of the place, and to affect his credibility. **Reid v. Linck,** 109.

NEW TRIALS.

1. *Discretion of court—Imposition of conditions.* The granting or refusing of a new trial except for causes like errors of law by the judge or misconduct of the jury, where it may be matter of right, is an exercise of judicial discretion by the court in furtherance of right and justice according to the circumstances of the case. Hence it is well settled that the court may impose terms upon either or both of the parties as conditions of the grant or refusal, and the latitude allowed to the discretion of the court to this end is very great.

Large as the discretion is, however, it is a judicial discretion and must be used with reference to the rights involved in the controversy. The condition imposed, therefore, must have some direct relation to the issue between the parties in the case.

In a proceeding to assess damages against a city for land taken for road purposes, the court cannot compel the plaintiff as an alternative to a new trial to convey to the city for park purposes three acres of his land cut off from the main body of his land by the road in question, neither party having asked for such conveyance. **Stauffer v. Reading,** 479.

2. *Trial—Jury—Relationship between jury and party.* **Geist v. Rapp,** 411.

NOTICE.

1. *Contracts—Estoppel—Taking over business of another—Assumption of debts.* **Sargent v. Johns,** 386.

2. *Gas companies—Liability of tenant for former tenant's gas bill—Notice.* **Miller v. Wilkes-Barre Gas Co.,** 254.

3. *Insurance—Mutual fire insurance—Assessments—Payment.* **Shuman v. Juniata Farmers' Mut. Fire Ins. Co.,** 417.

4. *Lunacy—Sale of real estate—Notice to next of kin.* **Mitchell v. Spaulding,** 220.

5. *Principal and agent—National bank—Banks and banking—Dealing in stocks.* **Nat. Bank of Boyertown v. Fridenberg,** 243.

NUISANCE.

1. *Public nuisance—Parties—Equity.* A public nuisance cannot be suppressed or enjoined at the suit of a private individual unless he has sustained some damage or injury which is clearly special to himself, and apart from that which the general public has sustained.

A private citizen cannot maintain a bill in equity to enjoin the enlarging of a frame building immediately opposite his residence, where the bill itself discloses that the neighborhood is of a residential character, that the erection of the building would endanger the property in the vicinity of the fire, and that the uses for which it was intended would deprive plaintiff and his neighbors from the full enjoyment

NUISANCE—*continued.*

and proper use of their property. In such a case the plaintiff to sustain his bill must allege an injury special to himself. **Rhymer v. Fretz,** 230.

OIL AND GAS LEASE.

1. *Mechanic's lien—Act of June* 17, 1887, *P. L.* 409—*Labor—Materials—Leasehold.* **James Smith Woolen Mach. Co. v. Browne,** 543.

ORDINANCES.

1. *Boroughs—Resolution—Electric lighting—Electric light company—Contract—Estoppel.* **Lansdowne v. Citizens' Elec. Lt. & Power Co.,** 188.

2. *Fire ordinances—Municipalities—Building laws—Wooden buildings—Reconstruction.* **Contas v. Bradford,** 291.

3. *Municipalities — Subcontractor's bonds — Waiver — Evidence.* **Phila. v. Neill,** 333.

4. *Prisons—Sheriff—Board of prisoners—Counties—Erie county—Municipalities.* **Burton v. Erie Co.,** 570.

PARENT AND CHILD.

1. *Negligence—Death—Adult son—Evidence.* **Blauvelt v. Del. Lack. & W. R. R. Co.,** 141.

PARTIES.

1. *Contracts—Joint obligation—Corporation.* **Pittsley v. King,** 193.

2. *Equity—Cross bill—Partnership.* **Kelley v. Shay,** 208.

3. *Infant—Suit against—Next friend—Guardian.* **Mitchell v. Spaulding,** 220.

4. *Insurance — Fire insurance — Cancelation — Contract — Action.* **Baldwin v. Penna. Fire Ins. Co.,** 248.

5. *Nuisance—Public nuisance—Equity.* **Rhymer v. Fretz,** 230.

6. *Partnership—Joint action—Res adjudicata—Judgment.* **McFarlane v. Kipp,** 317.

7. *Practice, C. P.—Amendments—Statute of limitations.* **Wright v. Eureka Tempered Copper Co.,** 274.

PARTITION.

1. *Agreement of parties—Master.* Where a master appointed to make partition reports that at a meeting of the parties in interest it was agreed by all persons present that the land in question could not be conveniently divided into as many purparts as there were parties entitled, one of the parties who was present cannot, after the expiration of sixteen months, and after many meetings, and when the proceedings were almost at a close, object to the plan of division suggested by the master, and deny the validity of the agreement reported by the master. In such a case it is immaterial that the agreement was not in writing, and that no note of it appeared in the record. **Black v. Black,** 116

2. *Title from different ancestors—Defective return.* In a partition of equal undivided interests in land devised by different ancestors, a re-

PARTITION—*continued.*

turn to the order of inquest is fatally defective which values the entire real estate as that of one ancestor, when in fact the estate of that ancestor is only a two-thirds interest, and all the proceedings had are in the one estate. **Hogg's Est.,** 415.

PARTNERSHIP.

1. *Accounting—Dissolution.* Where stipulations in articles of copartnership for a term of ten years provide for the continuance of the firm after the death of a member, and that the representatives of a deceased partner shall not participate in the management, but shall receive six per cent per annum on the capital invested, and a share of the profits from year to year, the representatives of a deceased partner have no standing by bill in equity until the expiration of the term to demand an accounting for interest and profits, where the surviving partners by their answers show that the deceased partner at the time of his death had withdrawn from the firm an amount in excess of his interest therein. **Brew v. Hastings,** 155.

2. *Dissolution of partnership—Distribution in specie.* The general rule that upon the dissolution of a partnership, it is the right of each partner to have the partnership property converted into money by a sale, does not apply where the circumstances of the parties would give to one an advantage in the bidding. In such a case if all the debts are paid, the court may divide the property in specie. **Kelley v. Shay,** 208.

3. *Evidence—Loan.* In an action for money loaned, the defense that plaintiff was a partner was met by plaintiff's evidence, that although he had bought an interest in a business of defendant, he had never received such interest, and had revoked the agreement. This presented only a question of fact for the jury. **Williams v. Williams,** 644.

4. *Joint owners of tugboat—Managing owner—Duty to account—Costs.* It is the duty of a managing owner of a tugboat to account to all the owners; and when he fails in the performance of this duty, and is compelled by legal proceedings to render an account, he should be visited personally with the costs. **Croasdale v. Von Boyneburgk,** 15.

5. *Joint owners of tugboat—Managing owner—Duty to commence criminal prosecution.* It is not the duty nor within the authority of the managing owner of a tugboat to institute a criminal prosecution against one of the joint owners alleged to be a defaulter, and he cannot claim a credit against his co-owners for the expense of such a criminal prosecution. **Croasdale v. Von Boyneburgk,** 15.

6. *Parties—Joint action—Res adjudicata—Judgment.* Where in an action by a partnership, the defendants set up a claim against the partnership, and secure a certificate in their favor upon which judgment is entered, they cannot maintain a second suit on exactly the same cause of action against one of the plaintiffs in the first suit and two other persons alleged to be partners, but not parties plaintiff in the first suit. **McFarlane v. Kipp,** 317.

7. *Right to engage in outside business.* Where a partner reserves to

PARTNERSHIP—*continued.*

himself the right to engage in business upon his own account in the same line in which the firm is engaged, he may, after purchasing stock of a corporation in whose business the partnership is interested, and paying for the same out of partnership assets, buy with his own money stock of the same corporation. **Kelley v. Shay,** 215.

8. *Settlement of account—Interest.* In the settlement of partnership accounts the allowance or refusal of interest depends upon the circumstances of each particular case; any unbending rule would work injustice in some case.

Except where there has been a fraudulent retention, or an improper application of money of the firm, it is not the practice of the courts to charge a partner with interest on money of the firm in his hands. **Kelley v. Shay,** 215.

9. *Suits—Breach of contract—Assumpsit.* While partnership accounts must be adjusted and settled and the liability of one partner to another ascertained by an action of account render, or by a bill in equity, this does not prevent one partner from suing another in assumpsit for damages resulting to the plaintiff from the dissolution of the partnership, wrongfully brought about by the bad faith and broken promises of the defendant.

In an action of assumpsit by one partner against another to recover damages for breach of the contract and wrongful dissolution of the partnership, a verdict and judgment for plaintiff will be sustained where the evidence, properly admitted, tends to show that the defendant had advised the men who had been employed by the firm in a quarry to bring suits against it, obtain judgments and sell out the partnership property, which he himself purchased; that he said the partnership was at an end; that he obtained an assignment of the lease of the quarry to plaintiff as well as of the farm on which the quarry was located, and entered judgment against plaintiff for default in payment of rent and issued execution on it; that he purchased the farm, and, with a new partner, opened a quarry close to the plaintiff's quarry and was operating it at the time of the trial; and that, when the plaintiff sold stone to get money to pay the men, he notified the parties to whom stone had been sold not to pay him.

In such a case the measure of damages is not the value of the quarry nor the plaintiff's share of the profits which the defendant made, but the value of the partnership to the plaintiff. **McCollum v. Carlucci,** 312.

PAYMENT.

1. *Accord and satisfaction—Contract—Estoppel—Assumption of debts of another.* **Ebert v. Johns,** 395.

2. *Accord and satisfaction—Payment before debt is due.* The rule that payment of a smaller sum is not a consideration to support an accord and satisfaction in regard to a larger sum due, has always been regarded as more logical than just or businesslike, and even small circumstances of variation have always been held sufficient to prevent its application. Hence a payment in advance, no matter how short a time, has been uniformly held to constitute a good consideration. **Weiss v. Marks,** 513.

PAYMENT—*continued.*

3. *Insurance—Mutual fire insurance—Assessments—Notice.* **Shuman v. Juniata Farmers' Mut. Fire Ins. Co.,** 417.

4. *Master and servant—Presumption—Housekeeper.* **Schrader v. Beatty,** 184.

PHILADELPHIA.

1. *Municipalities—Public officers—Accounts—Audit—Act of June* 1, 1885. **Com. v. Patterson,** 522.

PHYSICIANS.

1. *Negligence—Malpractice.* **De Long v. Delaney,** 226.

PLEADING.

1. *Practice, C. P.—Statute of limitations—Amendment.* **Barclay v. Barclay,** 307.

POINTS.

1. *Improper points—Charge.* **Karl v. Juniata Co.,** 633.

2. *Practice, C. P.—Trial—Instruction.* **Central Guarantee Tr. & Safe Deposit Co. v. White,** 611.

POWERS.

1. *To sell—Will—Conversion.* **Cooper's Est.,** 628.

2. *To sell—Will—Conversion—Purpose.* **Raleigh's Est.,** 451.

3. *Will—Condition—Landlord and tenant.* **Hanbest v. Grayson,** 59.

PRACTICE, C. P.

1. *Affidavit of defense—Affidavit by executor—Rules of court.* The court of common pleas has the power to make a rule of court as follows: "An affidavit of defense shall be required from executors, administrators, guardians, committees and others sued in a representative capacity. Provided, that an affidavit by the defendant in such a case, stating that he has made diligent inquiry and has not been able to obtain sufficient information to enable him to set forth particularly the nature and character of the defense but that he believes that there is a just and legal defense, shall be deemed sufficient compliance with this rule." **Helffrich v. Greenberg,** 516.

2. *Affidavit of defense—Contract—Set-off.* In an action on promissory notes, an affidavit of defense is sufficient which avers that plaintiff's claim was for money due on certain promissory notes given as memoranda for advancements by plaintiff to defendant on a contract under which the plaintiff was to take and sell on commission the entire product of defendant's fruit packing operations; the plaintiff had refused to take the whole product, whereby part of it was left over the season, to defendant's loss; that plaintiff had not accounted and given credit for the whole of the goods actually taken, had overcharged commissions on the part sold and accounted for; and that the plaintiff upon these transactions was indebted to the defendant

PRACTICE, C. P.—*continued.*

in a greater sum than the amount of the notes sued upon. **Andrews v. Blue Ridge Packing Co.,** 370.

3. *Affidavit of defense—Corporation—Officer.* Where the business manager of a defendant corporation swears to an affidavit of defense as to matters of his own knowledge, it is unnecessary for him to set forth his information and belief. **Andrews v. Blue Ridge Packing Co.,** 370.

4. *Affidavit of defense—Function of affidavit.* An affidavit of defense should set forth fully and fairly facts sufficient to show prima facie a good defense, and if it fails to do so, either from omission of essential facts, or manifest evasiveness in the mode of statement, it will be insufficient to prevent judgment. But if not deficient in either of these respects, and on its face fairly setting forth a prima facie defense, it is not to be subjected to close technical examination as if it was a special plea demurred to. Its office is to prevent a summary judgment and for that purpose a showing of a defense, with certainty to a common intent is sufficient. **Andrews v. Blue Ridge Packing Co.,** 370.

5. *Affidavit of defense—Husband and wife—Principal and surety—Conflict of laws.* **Peter Adams Paper Co. v. Cassard,** 179.

6. *Affidavit of defense—Supplemental affidavit of defense—Discretion of court—Allowance.* A supplemental affidavit of defense will be allowed if the court deems the defense to be probably good, but defectively stated in the original affidavit; a second or third supplemental affidavit may even be allowed. The extent of the indulgence is largely in the discretion of the court.

History of affidavit of defense law. Per MITCHELL, J. **Andrews v. Blue Ridge Packing Co.,** 370.

7. *Amendments—Parties—Statute of limitations.* Statutes of amendment are liberally construed to give effect to their clearly defined intent to prevent a defeat of justice through a mere mistake as to parties or the form of action. Amendments, however, will not be allowed to the prejudice of the other party, where the statute of limitations has run, by introducing a new cause of action or bringing in a new party, or changing the capacity in which he is sued. A party whose name it is asked to amend must be in court. If the effect of the amendment will be to correct the name under which the right party was sued it should be allowed; if its effect will be to bring a new party on the record, it should be refused after the running of the statute of limitations.

In an action of trespass to recover damages for personal injuries, the name of the defendant as stated in the writ was the Eureka Tempered Copper Company. Three years prior to the infliction of the injuries for which the suit was brought, the company named in the writ had failed, and its property was sold by the sheriff, but at the time of the suit it still existed as a corporation without doing any business. A new corporation known as the Eureka Tempered Copper Works succeeded to the property and business of the copper company. The plaintiff was injured while in the employ of the copper works. The service of a writ was made on the manager of the copper

PRACTICE, C. P.—*continued.*

works, but the sheriff, following the words of the writ, returned it as served on the manager of the copper company. The error in the name was not discovered by the plaintiff until a few daws after the statute of limitations had barred a new action. *Held*, reversing the court below, that permission should have been given to amend the record by striking out the word "company" and inserting the word "works." **Wright v. Eureka Tempered Copper Co.,** 274.

8. *Appeals—Charge—Assignments of error.* A judgment on a verdict will not be reversed because of a detached portion of the charge alleged as error, where it appears that the portion of the charge complained of, taken in connection with instruction immediately preceding it, and other portions of the charge, could not have possibly been misunderstood by the jury. **Karl v. Juniata Co.,** 633.

9. *Appeals—Interlocutory order—Scire facias sur municipal claim—Act of June* 4, 1901, *P. L.* 364. **Phila. v. Pemberton,** 73.

10. *Banks and banking—Checks—Forgery—Indorsement.* **Second Nat. Bank of Pittsburg v. Guarantee Tr. & S. D. Co.,** 616.

11. *Insurance—Accident insurance—Pleading.* **Dives v. Fidelity & Casualty Co. of N. Y.,** 199.

12. *Mortgage—Defense—Contract.* **Krimm v. Devlin,** 508.

13. *Payment before debt is due—Accord and satisfaction.* **Weiss v. Marks,** 513.

14. *Pleading—Statute of limitations—Amendment.* The statute of limitations is a defense upon facts, and must be pleaded. It cannot be made by a demurrer which raises only an issue of law. It is not a defense absolute of which the court will take judicial notice on the plaintiff's presentation of his case, either in his declaration or at the trial, for if the defendant does not choose to make it, it is not a part of the case at all. And the only way the defendant can make it is by plea.

The defense of the statute of limitations cannot be raised by demurrer.

In an action upon a promissory note brought six years after the expiration of the date of the note where the statement avers that the defendant has always refused to pay the note, and an amended statement filed by leave of court sets forth facts sufficient to remove the *prima facie* bar of the statute of limitations, it is error for the court to enter judgment for defendant on the amended statement on the ground of the inconsistency between the two statements. In such a case the amended statement is the only one before the court. **Barclay v. Barclay,** 307.

15. *Points for charge—Several propositions.* A point for charge containing several propositions of law, some good, and others clearly not, is properly refused. A point should contain but a single legal proposition and be so constructed that the trial court can answer it by a simple affirmation or negation. **Seifred v. Penna. R. R. Co.,** 399.

16. *Rules of court—Agreements of attorneys.* A rule of court requiring agreements of attorneys touching the business of the court to be in writing has no application to an agreement made in open court or before a master, during the trial of the cause, nor to one on which

PRACTICE, C. P.—*continued.*

the court or the master at the time is asked by the parties to act. **Black v. Black,** 116.

17. *Trial—Appeals.* Errors alleged to have been committed by the judge in referring to the testimony if not brought to the attention of the lower court at the trial will not be considered by the appellate court. **Kuntz v. N. Y. C. & St. L. R. R. Co.,** 162.

18. *Trial—Instructions—Points.* Where a trial judge has given a binding direction as to the verdict, what he says to the jury in explanation or comment on the case, and his refusal to answer points, become entirely immaterial.

Points are statements of the rules or principles of law, specially applicable to the case, and therefore given to the jury as guides in applying the law to the facts. But where the jury has no such duty and the judge himself determines the combined result of the law and the facts as presented, points become immaterial. **Central Guarantee Tr. & S. D. Co. v. White,** 611.

PRACTICE, EQUITY.

1. *Cause of action—Joint bill.* It is irregular practice in equity to join in a bill filed by several parties causes of action which are not the same, or which are not founded on any joint right. **Coatesville & Downingtown St. Ry. Co. v. West Chester Ry. Co.,** 40.

2. *Exceptions to decree nisi—Filing exceptions nunc pro tunc—Appeals.* **Hinnershitz v. United Trac. Co.,** 91.

3. *Findings of fact and conclusions of law.* **Lehigh Val. Coal Co. v. Everhart,** 118.

4. *Rules—Master—Corporation—Elections.* **Yetter v. Del. Val. R. R. Co.,** 485.

PRACTICE, O. C.

1. *Orphans' court practice—Bill of review—Appeal.* The statutory period for appeal from a decree of the orphans' court cannot be enlarged by a bill of review to correct an error of law which might have been the subject of appeal from the decree on the original account. **Sherwood's Est.,** 465.

2. *Orphans' court practice.* Where an account filed in the orphans' court contains an item of distribution, and a person interested in the estate appends to the account a formal statement under seal that he has examined the account and prayed the court to confirm it absolutely as stated, such a person is estopped from subsequently taking an appeal on the ground of an error in the item of distribution in the account. **Sherwood's Est.,** 465.

PRACTICE, SUPREME COURT.

1. *Appeals—Assignments of error.* **Seifred v. Penna. R. R. Co.,** 399.

2. *Appeals—Assignments of error—Equity—Exceptions.* **Phila. & T. R. R. Co. v. Neshaminy Elev. Ry. Co.,** 343.

PRACTICE, SUPREME COURT—*continued.*

3. *Assignment of errors—Rule* 11 *and Equity Rule* 92. Equity Rule 92 requires the appellant to file in the court below "a brief statement of the errors he alleges to have been made by the order or decree appealed from." Rule 11 of the rules of the Supreme Court requires the appellant to "specify in writing the particular errors which he assigns, and to file the same in the prothonotary's office" of the Supreme Court. Failure to observe these two rules in equity cases may result in the appeal being non prossed. **Croasdale v. Von Boyneburgk,** 15.

PRESUMPTION.

1. *Constitutional law—Control of property by state—Property of absentee—Administrators—Act of June* 24, 1885, *P. L.* 155. **Cunnius v. Reading School Dist.,** 469.

2. *Contracts—Parties—Joint obligation—Corporation.* **Pittsley v. King,** 193.

3. *Marriage—Evidence—Legitimacy—Partition.* **Dailey v. Frey,** 227.

4. *Negligence—Electric light companies.* **Crowe v. Nanticoke Lt. Co.,** 374.

5. *Negligence—Railroads—Grade crossing—"Stop, look and listen"—Evidence.* **Blauvelt v. Del. Lack. & W. R. R. Co.,** 141.

6. *Negligence—Street railways—Passenger—Collision—Jumping from car.* **Palmer v. Warren St. Ry. Co.,** 574.

7. *Payment—Master and servant—Housekeeper.* **Schrader v. Beatty,** 184.

PRINCIPAL AND AGENT.

1. *Corporation—Evidence.* **Culver v. Pocono Spring Water Ice Co.,** 481.

2. *National bank—Banks and banking—Dealing in stocks—Notice.* Where a bank authorizes its cashier to buy and sell stocks, and the authority of the cashier is apparently general and without limitation as to the character and amount of the securities he is to purchase, and as to whether the transactions should be on margin or for cash, and it appears that the cashier opens an account in the name of the bank with a firm of brokers and buys and sells stocks on the bank's account, both for cash and on margin, and it also appears that large profits were made for the bank on the cash transactions, the bank cannot, after the cashier has absconded, claim that it was not liable for losses on some of the margin transactions. **Nat. Bank of Boyertown v. Fridenberg,** 243.

3. *Vice principal—Negligence—Master and servant—Fellow-servant.* **Butterman v. McClintic-Marshall Construction Co.,** 82.

PRINCIPAL AND SURETY.

1. *Husband and wife—Conflict of laws—Affidavit of defense.* **Peter Adams Paper Co. v. Cassard,** 179.

PRISONS.

1. *Sheriff—Board of prisoners—Counties—Erie county—Municipalities.* The sheriff of Erie county is bound to receive and board prisoners committed to the county jail by the mayor and alderman of the city of Erie for violation of city ordinances, and the county is bound to pay the sheriff for the board of the prisoners so committed.

The mayor and alderman of a city have power to commit to the county jail persons guilty of violating city ordinances. **Burton v. Erie,** 570.

PROMISSORY NOTES.

1. *Notes held as collateral—Actions.* Where a creditor takes from a bankrupt composition notes under an agreement that if any note should be in default, all shall become due, and subsequently the creditor assigns his claim to a third person and takes in payment thereof the notes of the third person, and retains the composition notes as security for payment of the other notes, the creditor cannot proceed on the composition notes until after a default upon the other notes, and this is the case although there may have been a default on the composition notes. **Willey v. Browne,** 322.

PROVINCE OF COURT AND JURY.

1. *Appeals—Charge—Exceptions—Quashing appeal.* **McConnell v. Penna. R. R. Co.,** 370.

2. *Bill of exchange—Presentation—Delay—Negligence—Acceptance of notes—Lunacy.* **Aspinall v. Viney,** 383.

3. *Evidence—Computation.* **Blauvelt v. Del. Lack. & W. R. R. Co.,** 141.

4. *Independent contractor—Illustration.* Where the court has given the jury a correct definition of an independent contractor, it can in nowise confuse or mislead the jury by giving an illustration as follows: "If the commissioners employ a tinner to roof this courthouse making no provision as to how the old tin is to be removed or the new tin raised up and placed, and the commissioners are not present directing the operation or the manner of its performance and have relinquished their power over the work or manner of its performance and an accident befall an employee or other person, the county would in nowise be responsible for any act, negligent or otherwise, by the employer whereby some one is injured." **Karl v. Juniata Co.,** 633.

5. *Libel—Innuendo.* **Naulty v. Bulletin Co.,** 128.

6. *Lunacy—Signing of check—Evidence.* **Central Guarantee Tr. & S. D. Co. v. White,** 611.

7. *Negligence.* **Custer v. Balto. & O. R. R. Co.,** 529.

8. *Negligence—City—Defect in highway.* **Behl v. Phila.,** 329.

9. *Negligence—Contributory negligence.* **Butterman v. McClintic-Marshall Construction Co.,** 82.

10. *Negligence—Contributory negligence—Harmless error.* **Fitzpatrick v. Union Trac. Co.,** 335.

11. *Negligence—Extent of injuries.* **Smith v. Muncy Creek Twp.,** 7.

PROVINCE OF COURT AND JURY—*continued.*

12. *Negligence—Hole in sidewalk—Contributory negligence.* **Iseminger v. York Haven Water & Power Co.,** 591.

13. *Negligence—Ice on pavement.* **Brown v. White,** 106.

14. *Negligence—Master and servant—Scaffolding.* **Geist v. Rapp,** 411.

15. *Negligence—Railroad—Bridge.* **Sutliff v. Penna. R. R. Co.,** 267.

16. *Negligence—Railroads—Tracks in street.* **Holt v. Penna. R. R. Co.,** 356.

17. *Negligence—Unguarded elevator shaft—Evidence.* **Reid v. Linck,** 109.

18. *Points—Improper points.* A point is properly refused which assumes that the jury could have found facts of which there was no proof, and asks them to give undue effect to other facts. **Karl v. Juniata Co.,** 633.

19. *Points of charge—Practice. C. P.—Several propositions.* **Seifred v. Penna. R. R. Co.,** 399.

PROXIMATE CAUSE.

1. *Negligence—Master and servant—Safe place.* **Butterman v. Clintic-Marshall Construction Co.,** 82.

PUBLIC OFFICERS.

1. *Bridges—Repair of bridges—Counties—Townships—Acts of April* 13, 1843, *P. L.* 221, *March* 30, 1859, *P. L.* 309, *and March* 12, 1860, *P. L.* 144—*Negligence—Defective bridge—Traction engines.* **Smith v. Muncy Creek Twp.,** 7.

2. *Controller—Philadelphia — Municipalities — Accounts — Audit—Act of June* 1, 1885. **Com. v. Patterson,** 522.

3. *Director of department of public works—Decision of—Municipal contracts.* **Com. v. Pittsburg,** 379.

4. *Sheriff—Prisons—Board of prisoners—Counties—Erie county—Municipalities.* **Burton v. Erie Co.,** 570.

RAILROADS.

1. *Crossing of highways—Judicial supervision—Act of June* 7, 1901. Since the passage of the Act of June 7, 1901, P. L. 531, every grade crossing, whether of one railroad by another, or of a highway by a railroad, comes before the court with a heavy burden of proof upon it.

The fact that a grade crossing of a railroad over a highway is incidental to the relocation of an existing highway under the act of 1836, does not relieve such crossing from the ban of the first section of the act of June 7, 1901, which provides that "all crossings hereafter established" shall be above or below grade.

The provisions of section 4 of the act of June 7, 1901, which authorizes the court of common pleas to permit grade crossings under certain conditions, must be strictly followed, and there is no substitute for them either in manner or form. Previous proceedings in the

RAILROADS—*continued.*

quarter sessions, although before the same judge, cannot be considered as a substitute for the proceedings provided for in section 4.

On a petition under section 4 of the act of June 7, 1901, to locate a grade crossing of a railroad over the approach to a county bridge, it was alleged that the duties of, the county commissioners ended at the bridge, and that the railroad tracks were so far from it that the construction of the crossing would be the work of the township authorities who were not before the court. The court dismissed the petition on the ground that prior proceedings in the quarter sessions under the act of 1836 were conclusive. *Held*, on appeal, that the decree should be affirmed, not for the reason stated by the court, but by reason of the questions of fact raised, and that the appellant should be turned over to the more plastic and convenient remedy of a bill to enjoin the construction of the bridge in such manner as would require the highway to cross the railroad at grade.

It seems that on an appeal from a decree dismissing a petition filed under section 4 of the act of June 7, 1901, that the appellate court, following the analogy of the rule in equity, may consider the reasons given by the lower court for its action. **Mifflinville Bridge,** 420.

2. *Grade crossing—Duty as to flagman—Negligence—"Stop, look and listen."* **Seifred v. Penna. R. R. Co.,** 399.

3. *Negligence—Bridge—Province of court and jury.* **Sutliff v. Penna. R. R. Co.,** 267.

4. *Negligence—Broken rail—Rotten ties—Evidence—Res gestæ—Declarations.* **Briggs v. E. Broad Top R. R. & Coal Co.,** 564.

5. *Negligence—Crossing—"Stop, look and listen."* **Kuntz v. N Y. C. & St. L. R. R. Co,** 162; **Fleschhut v. Lehigh Val. R. R. Co.,** 348.

6. *Negligence—Grade crossing—"Stop, look and listen"—Evidence—Presumption.* **Blauvelt v. Del. Lack. & W. R. R. Co.,** 141.

7. *Negligence—Joint tort feasors—Action.* **Goodman v. Coal Twp.,** 621.

8. *Negligence—Master and servant—Evidence—Explosion of locomotive—Fellow-servant—Fireman—Boiler inspector.* **Marsh v. Lehigh Val. R. R. Co.,** 558.

9. *Negligence—Master and servant—Fellow-servant—Act of April* 4, 1868, *P. L.* 58. **Keck v. Phila. & R. R. R. Co.,** 501.

10. *Negligence—Speed of train—Crossing.* **Custer v. Balto. & O. R. R. Co.,** 529.

11. *Negligence—Tracks in street.* **Holt v. Penna. R. R. Co.,** 356.

12. *Railways—Words and phrases.* The words "railroad" and "railway" used in statutes of Pennsylvania will be considered as synonymous, and either will be held to apply both to steam railroads and street railways, unless there appears from the title of the act, its purpose or its context something to indicate that a particular kind of a road is intended. **Phila. v. Phila. Trac. Co.,** 35.

13. *Street railways—Boroughs—Contract—Performance—Impossibility of performance.* A street railway company which has entered into a contract with a borough to build a railway on a street, is not relieved from its contract by reason of the fact that for a distance of 750 feet, the company was confined to the use of about eleven feet

RAILROADS—*continued.*

only in width of the highway; and this is especially the case where the evidence is not conclusive that the railway could not have been constructed and operated on the street. **Montooth Boro. v. Brownsville Ave., St. Ry. Co.,** 338.

14. *Street railways — Consent of landowner — Estoppel — Laches.* Where a street railway company lays a single track along a portion of its route on a turnpike road in such a way as to indicate plainly an intention to build a double track road and the single track is operated for two years, and the company then proceeds to lay a second track, and landowners do not file a bill until more than one third of the new track has been constructed, the plaintiffs in such bill will be barred by laches from relief in equity. **Hinnershitz v. United Trac. Co.,** 91.

15. *Street railways—Elevated passenger railway—Eminent domain—Injunction—Equity.* A passenger railway incorporated under the Act of June 7, 1901, P. L. 523, for the purpose of constructing an elevated passenger railway on a public highway of a designated distance of one mile, may after it has received the consent of the local authorities, and has filed a bond to secure a nonconsenting landowner, build such a road, notwithstanding the existence of injunctions secured at the instance of the landowner and restraining other street railway companies from building a surface street railway on the mile designated, so as to complete a continuous line of long distance electric railway. **Phila. & Trenton R. R. Co. v. Neshaminy Elev. Ry. Co.,** 343.

16. *Street railways—Extensions—Location—Exemplification—Acts of May* 14, 1889, *P. L.* 211, *and June* 7, 1901, *P. L.* 514. The filing by a street railway in the office of the secretary of the commonwealth of an exemplification of the record of the adoption of an extension, is a condition precedent to the construction of the extension. **Coatesville & Downingtown St. Ry. Co. v. West Chester Ry. Co.,** 40.

17. *Street railways—Injury to passenger—Contributory negligence.* **Jennings v. Union Trac. Co.,** 31.

18. *Street railways—Lease—Municipal consent—Traction company.* Where a street railway company which has municipal consent to the use of streets, leases its road to a traction company, the latter company succeeds to the right of the street railway company to the use of the streets. **Conshohocken Boro. v. Conshohocken Ry. Co.,** 75.

19. *Street railways—Location—Extensions—Rival companies—Acts of May* 14, 1889, *and June* 7, 1901. Where a street railway company incorporated subsequently to the act of June 7, 1901, has promptly applied for the consent of the local authorities, it cannot be disturbed in the exclusive privilege of the highways named in its charter, for the period of two years allowed for construction; and it has a standing in equity to enjoin a company incorporated prior to the act of June 7, 1901, from building extensions on such streets during the running of the two years.

Not decided, whether the two years' period in which to procure municipal consent, allowed by the act of June 7, 1901, will be shortened or terminated by a positive act of refusal on the part of the munici-

RAILROADS—*continued.*

pality, or whether the full period may still be available for an opportunity to overcome objections.

Not decided, whether a street railway company may build a substantial portion of its route over a private right of way, not on any street or highway. **Coatesville & Downingtown St. Ry. Co. v. West Chester Ry. Co.,** 40.

20. *Street railways—Municipal consent—Condition—Guard wires.* Where a borough in granting to a street railway company the right to use streets, requires the company to use guard wires over the trolley wire, and the borough delays for a long time to enforce this condition, and then files a bill to restrain the operation of cars, but the real purpose of the bill is not to compel the erection of guard wires, the court will dismiss the bill, if within a reasonable time the company puts up the wires. **Conshohocken Boro. v. Conshohocken Ry. Co.,** 75.

21. *Street railways—Municipalities—Paving.* Where a street railway company is under contract to pave the full width of a street where sidings are maintained, whenever the borough paves the rest of the street, the street railway company may remove the siding before such paving is begun; and if in good faith it gives notice to the borough prior to the ordinance, authorizing the paving, of its intention to remove the siding, and further notifies the borough three months before the latter incurs any liability that the siding will be removed as soon as frost is out of the ground, and the siding is actually removed, the company cannot be held liable for paving the full width of the street at the point where the siding was located. **Shamokin Boro. v. Shamokin & Mt. Carmel Elec. Ry. Co.,** 625.

22. *Street railways—Negligence—Crossings—"Stop, look and listen" —Motormen.* **Bobb v. Union Trac. Co.,** 265.

23. *Street railways—Negligence—Passenger—Presumption—Collision—Jumping from car—Measure of care—Carriers.* **Palmer v. Warren St. Ry. Co.,** 574.

24. *Street railways—Special charter—Duty to repave streets—Act of April* 15, 1863, *P. L.* (1864) 1080. Where a street railway is incorporated under a special charter which provides "said company, in constructing said road, shall conform to the grades now used, or hereafter to be by law used, of the several streets, roads and avenues traversed by said road, and keep the same in good repair, at the proper expense of said company," and it has kept the portion of the streets occupied by its railway in good repair, it cannot be required to pay for repaving them with a new and different kind of pavement adopted by a city whose streets it traverses. **Williamsport v. Williamsport Pass. Ry. Co.,** 65.

25. *Street railways—Turnpike roads—Eminent domain—Act of May* 14, 1889, *P. L.* 211. The Act of May 14, 1889, sec. 17, P. L. 211, which gives to street railway companies the right to condemn a turnpike or turnpikes on making "compensation to the owner or owners thereof," does not include the right as to the soil under the turnpike, and therefore as against the abutting landowners. **Hinnershitz v. United Trac. Co.,** 91.

RAILROADS—*continued.*

26. *Street railway companies—Negligence—Passenger on running board of car—Sudden jerk.* **Bainbridge v. Union Trac. Co,** 71.

27. *Streets—Grading—Siding above established grade.* On a bill in equity to restrain a railroad company from laying a siding in a street in any other manner than upon the established grade of the street, the plaintiff is entitled to relief where it appears by the preponderance of proof that the tracks as laid in the manner contemplated would be nine and five eighths inches above the established grade; that embankment thus made would seriously interfere with access to plaintiff's property; that water in larger quantities than before would be cast upon plaintiff's land, and that the work was being done without any supervision by the street committee of councils, in violation of the ordinance which authorized the work. **Zook v. Penna. R. R. Co.,** 603.

28. *Traction motor companies—Franchise—Street railways.* When a traction motor company operates a street railway, and leases the property and franchises of various railway companies, and operates them on its own account, it is exercising the franchise of a street railway company; and it enjoys the privileges granted to, and becomes subject to the liabilities imposed by law upon such company. **Phila. v. Phila. Trac. Co.,** 35.

REAL ESTATE.

1. *Church law—Presbyterian church—Title to property—Trustees—Session.* **Dayton v. Carter,** 491.

2. *Consent of landowner—Street railways—Estoppel—Laches.* **Hunershitz v. United Trac. Co.,** 91.

3. *Decedent's estates—Judgment lien—Distribution of proceeds of sale.* **Bowman v. Knorr,** 272.

4. *Deeds—Evidence—Parol evidence.* **Fink v. Van Fossen,** 362.

5. *Land law—Surveys—Warrants—Boundaries.* **Knupp v. Barnard,** 280.

6. *Partition—Title from different ancestors—Defective return.* **Hogg's Est.,** 415.

7. *Sale of—Wills—Intention of testator—Trusts and trustees—Executors and administrators.* **Gehr v. McDowell; Strite v. Norton,** 100.

8. *Statutes—Repugnant proviso—Building laws—Collateral support—Act of June* 8, 1893, *sec.* 8, *P. L.* 360—*Philadelphia.* **Wadasz v. Arcade Real Est. Co.,** 539.

9. *Tax sales—Payment of tax by agent—Redemption.* **Wheeler v. Knupp,** 306.

10. *Taxation—Street railways—Traction motor companies—Act of April* 21, 1858, *P. L.* 385. **Phila. v. Phila. Trac. Co.,** 35.

11. *Title to—Church law—Roman Catholic Church—Independent congregation.* **Thaddeus Dochkus v. Lithuanian Ben. Soc. of St. Anthony,** 25.

12. *Title to—Sale of real estate—Lunacy—Inquisition—Setting aside inquisition—Notice to next of kin.* **Mitchell v. Spaulding,** 220.

13. *Will—Power to sell—Conversion—Purpose.* **Raleigh's Est.,** 451.

RECEIPTS.

1. *Contract—Estoppel—Assumption of debts of another—Accord and satisfaction.* **Ebert v. Johns,** 395.

RES ADJUDICATA.

1. *Partnership—Parties—Joint action—Judgment.* **McFarlane v. Kipp,** 317.

RES GESTÆ.

1. *Evidence—Declarations—Negligence—Railroads.* **Briggs v. E. Broad Top R. R. & Coal Co.,** 564.

RIOTS.

1. *Martial law—Government—Order of governor.* **Com. v. Shortall,** 165.

ROAD LAW.

1. *Change of grade—Damages—Paving street.* It is the physical change and not the mere establishment of a grade on the official plans which gives a right of action, and no damages are recoverable for the establishment of the grade until the actual work of grading is begun.

A person who owns land on both sides of a street on a city plan with a grade established above the natural surface, cannot, after he has built houses according to the established grade, and, with the permission of the city authorities, paved the street according to the established grade, recover damages for injuries to his land caused by the elevation of the natural surface of the street to the established grade. **Devlin v. Phila.,** 518.

2. *New trials—Discretion of court—Imposition of conditions.* **Stauffer v. Reading,** 479.

ROYALTIES.

1. *Mines and mining—Lease.* **Lehigh Val. Coal Co. v. Everhart,** 118.

RULES OF COURT.

1. *Equity rules—Master—Corporation—Elections.* **Yetter v. Del. Val. R. R. Co.,** 485.

2. *Practice, C. P.—Affidavit of defense—Affidavit by executor.* **Helffrich v. Greenberg,** 516.

3. *Practice, C. P.—Agreements of attorneys.* **Black v. Black,** 116.

4. *Practice, Supreme Court—Assignments of errors—Rule* 11 *and Equity Rule* 92. **Croasdale v. Von Boyneburgk,** 15.

SALES.

1. *Distribution of proceeds of sale—Decedent's estates—Judgment lien—Real estate.* **Bowman v. Knorr,** 272.

2. *Of personal property—Lunacy—Committee.* **Spaulding v. Bullock,** 224.

SCIRE FACIAS.

1. *Sur municipal claim—Appeals—Practice, Supreme Court—Interlocutory order—Act of June* 4, 1901, *P. L.* 364. **Phila. v. Pemberton,** 73.

SET-OFF.

1. *Affidavit of defense—Contract.* **Andrews v. Blue Ridge Packing Co.,** 370.
2. *Evidence—Memorandum.* **Hottle v. Weaver,** 87.

SHERIFF, see Public Officers.

SIDEWALKS.

1. *Hole in sidewalk—Negligence—Contributory negligence—Province of court and jury.* **Iseminger v. York Haven Water & Power Co.,** 591.

SLANDER.

1. *Actionable words—"Damned bitch"—Innuendo—Amendment.* Where words may have a double or doubtful meaning, the plaintiff may by innuendo charge which meaning he attributes to them, and it will be for the jury to find whether they were spoken with that meaning or not.

While the word "bitch" is frequently used as a general term of opprobrium without any reference to chastity, still it is often used as meaning a lewd woman.

Plaintiff declared for slander by the words "damned bitch," laid with an innuendo that she, being a married woman, was thereby charged with having been guilty of adultery. After the statute of limitations had run in favor of the defendant, plaintiff sought to amend the statement by adding the words "whore and" before the others. *Held*, that the amendment should have been allowed, and the question left to the jury with instructions that if they find that the words were used with intent by the defendant, or in such manner as to be understood by the hearers in the sense charged, they might find for the plaintiff without proof of special damages, and might also consider the words in the amendment, but otherwise they must disregard the word "whore" (if proved) and find for the defendant unless special damage was shown.

An amendment introducing a new cause of action will not be permitted after the statute of limitations has run in favor of the defendant; but if the amendment is merely a restatement of substantially the same cause of action, though in a different form, the variance in form will not prevent the amendment. **Stoner v. Erisman,** 600.

SPENDTHRIFT TRUSTS.

1. *Trust and trustees—Acting trust.* **Minnich's Est.,** 405.

STATUTE OF LIMITATIONS.

1. *Equity—Mistake of fact.* **Ridgway's Account,** 587.

STATUTE OF LIMITATIONS—*continued.*

2. *Escheats—Disappearance of legatees—Act of May* 2, 1889, *P. L.* 66. **Bousquet's Est.,** 534.

3. *Orphans' court—Jurisdiction—Mutual accounts.* **Miller v. Fulton,** 595.

4. *Practice, C. P.—Amendments—Parties.* **Wright v. Eureka Tempered Copper Co.,** 274.

5. *Practice, C. P.—Pleading—Amendment.* **Barclay v. Barclay,** 307.

STATUTES.

1. *Amendments of—Constitutional law—Mechanic's lien—Art.* 3, *sec.* 6 *of the constitution—Act of June* 17, 1887, *P. L.* 409.

2. *Constitutional law—Control of property by state—Presumption—Property of absentee—Administrators—Act of June* 24, 1885, *P. L.* 155. **Cunnius v. Reading School Dist.,** 469.

3. *Repugnant proviso—Building laws—Collateral support—Act of June* 8, 1893, *sec.* 8, *P. L.* 360—*Philadelphia.* The latter part of section 8 of the Act of June 8, 1893, P. L. 360, which reads: "Should any owner or owners desire to excavate to a depth of more than ten feet, he or they shall protect and underpin the wall of an adjoining structure at his or their own expense; provided, however, that this section shall not apply to buildings now erected or to dwelling houses," is not intended to apply to all buildings, but only in the future to certain classes of buildings, i. e., buildings other than dwelling houses erected after the passage of the act. With this intent the proviso is entirely consistent, and both the section and the proviso can stand. **Wadasz v. Arcade Real Est. Co.,** 539.

4. *Title of—Constitutional law—Waterworks—Boroughs—Act of May* 3, 1901, *P. L.* 140. **Potter Co. Water Co. v. Austin Boro.,** 297.

STOCKS.

1. *Capital stock of corporation—Taxation—Coal on hand—Mining companies.* **Com. v. Del. Lack. & Western R. R. Co.,** 645.

2. *Illegal issue of stock—Corporations—Constitutional law—Constitution of Pennsylvania, article* 16, *section* 7—*Act of May* 7, 1887, *P. L.* 94. **Yetter v. Del. Val. R. R. Co.,** 485.

3. *Principal and agent—National bank—Banks and banking—Dealing in stocks—Notice.* **Nat. Bank of Boyertown v. Fridenberg,** 243.

STREETS.

1. *Paving—Municipalities—Street railways.* **Shamokin Boro. v. Shamokin & Mt. Carmel Elec. Ry. Co.,** 625.

2. *Railways—Lease—Municipal consent—Traction company—Condition—Guard wires.* **Conshohocken Boro. v. Conshohocken Ry. Co.,** 75.

3. *Siding on street above established grade—Equity—Question at issue—Railroad.* **Zook v. Penna. R. R. Co.,** 603.

4. *Tracks in—Negligence—Railroads.* **Holt v. Penna. R. R. Co.,** 356.

TAX SALES.

1. *Payment of tax by agent—Redemption.* A tax title cannot be sustained where it appears by the books of the treasurer and by other records that an agent of the owners of unseated land bought in the land at a tax sale, that the taxes had been regularly assessed, and that the agent before the maturity of the deed paid taxes, and that these had been accepted by the treasurer. **Wheeler v. Knupp,** 306.

TAXATION.

1. *Capital stock of corporation—Coal on hand—Mining companies.* The value of coal which a Pennsylvania mining corporation has on hand in other states, and which it has shipped to such other states for the purpose of sale, and not to serve any permanent corporate purpose, cannot be deducted in determining the value of the capital stock of such corporation for the purpose of taxation; and it is immaterial that taxes were assessed and paid on the coal in the states where it was stored awaiting sale, if it does not appear whether such taxes were paid for state, local or municipal purposes, and it appears that they were paid without contest. **Com. v. Del. Lack. & Western R. R. Co.,** 645.

2. *Collateral inheritance tax—Decedent's estates—Property in another state.* Where a man dies intestate and domiciled in another state, and leaves personal property, all of which is in the state of decedent's domicile, and two weeks afterwards his sister, who was domiciled in Pennsylvania and who was entitled to a share of his estate, also dies before actually receiving any of the estate, such share of the estate is liable for the payment of the collateral inheritance tax of the state of Pennsylvania.

In such a case the sister immediately upon the death of her brother was not only in constructive possession of her share of his estate, but she was to a degree in actual possession, inasmuch as she could exercise every right of an owner in actual possession, except that of determining the amount of charges for administration; she was the absolute uncontrolled owner subject to a trifling lien. **Milliken's Est.,** 149.

3. *Special tax levy — Municipalities — Indebtedness — Judgment.* **Plains Township's Appeal,** 556.

4. *Store orders—Statement of account—Act of June* 24, 1901, *P. L.* 596. A paper given by a coal company to an employee, in which the latter is credited with the full amount of wages earned, debited with amounts not due because already paid to him or upon his orders, and the balance shown which is due him, and is payable in money, is not an order upon which the company can be taxed under the Act of June 24, 1901, P. L. 596. **Com. v. Lehigh Coal & Nav. Co.,** 641.

5. *Street railways—Traction motor companies—Real estate—Act of April* 21, 1858, *P. L.* 385. The legislature has the power to authorize a municipality to impose a tax upon the real property of railway corporations situated in a city.

A traction motor company which leases and operates street railways in the city of Philadelphia is subject to the Act of April 21, 1858, P. L. 385, which provides that "the offices, depots, car houses,

TAXATION—*continued.*

and other real property of railway corporations situate in said city, the superstructure of the road and water stations alone excepted, are and hereafter shall be subject to taxation by ordinance for city purposes." **Phila. v. Phila. Trac. Co.,** 35.

6. *Tax sales—Payment of tax by agent—Redemption.* **Wheeler v. Knupp,** 306.

TELEGRAPH AND TELEPHONE COMPANIES.

1. *Municipalities—Laches—Estoppel—Equity.* A bill in equity filed by a municipality to compel a telegraph and telephone company to remove poles and wires from the streets is properly dismissed on the ground of the plaintiff's laches, where it appears that the municipality had permitted the defendant and its predecessors to occupy the streets with poles and wires for more than twenty-one years; that without protest or objection the municipality had stood silently by while the defendants spent from $75,000 to $100,000; that by numerous resolutions passed by both branches of counsel, and many of them duly approved by the mayor, consent had been given to the erection and use of the poles, cross arms, etc., on the streets and highways of the city; that, for the privileges extended by it to the defendants, it had received a valuable consideration in the use of the poles for the carrying of the wires of its fire alarm service; that it had received and duly receipted for license and pole taxes assessed against the defendants; that it had used the telephone instruments furnished by the defendants down to the date of the hearing; that it had by general ordinances, regularly passed, approved and published, regulated the manner in which the poles should be erected and placed; that a consideration to the city in extending privileges to the defendants was a reservation of "the topmost gain" for police and fire-alarm wires; and that the city had permitted all the poles of the defendants to be erected under the direction of either the street committee of counsel, the street commissioner or the city engineer. **Bradford v. N. Y. & Penna. Telep. & Teleg. Co.,** 582.

TESTAMENTARY CAPACITY.

1. *Will—Probate—Issue d. v. n.—Undue influence.* **Kane's Est.,** 204; **Richmond's Est.,** 219.

TITLE.

1. *To property—Church law—Presbyterian Church—Trustees—Session.* **Dayton v. Carter,** 491.

2. *To real estate—Church law—Roman Catholic Church—Independent congregation.* **Thaddeus Dochkus v. Lithuanian Ben. Soc. of St. Anthony,** 25.

TOWNSHIP SUPERVISORS, see Public Officers.

TOWNSHIPS.

1. *Bridges—Repair of—Counties—Acts of April* 13, 1843, *P. L.* 221, *March* 30, 1859, *P. L.* 309, *and March* 12, 1860, *P. L.* 144—*Defective bridge—Traction engines.* **Smith v. Muncy Creek Twp.,** 7.

TOWNSHIPS—*continued.*

2. *Negligence—Joint tort feasors—Action.* **Goodman v. Coal Twp.,** 621.

TRESPASS, see Actions.

TRIALS.

1. *Criminal law—Murder—Evidence—Testimony taken before a justice of the peace.* **Com. v. Lenousky,** 277.

2. *Jury—Relationship between jury and party—New trial.* The appellate court will not review the action of the trial court in refusing a new trial asked for on the ground of an alleged relationship between a party and a juror, where the court below has found upon apparently sufficient evidence that no such relationship actually existed between the parties. **Geist v. Rapp,** 411.

3. *Practice, C. P.—Appeals.* **Kuntz v. N. Y. C. & St. L. R. R. Co.,** 162.

4. *Practice, C. P.—Instructions—Points.* **Central Guarantee Tr. & S. D. Co. v. White,** 611.

TRUSTS AND TRUSTEES.

1. *Church law—Presbyterian Church—Title to property—Session.* **Dayton v. Carter,** 491.

2. *Guardian and ward—Removal of guardian—Removal of trustee.* **Mansfield's Est.,** 64.

3. *Removal of trustee—Guardian and ward.* **Wallace's Est.,** 105.

4. *Sale of real estate—Executors and administrators.* Where a testator has given to his executors powers to manage and sell his estate as trustees, and after the executors have performed all their functions as executors and have died, and the court has appointed a trustee of the estate, the trustee, and not an administrator d. b. n. c. t. a. is the proper person to make a sale of the real estate as directed by the will. **Gehr v. McDowell; Strite v. Norton,** 100.

5. *Spendthrift trust—Acting trust.* A gift of an estate to a trustee to invest the same in real estate or otherwise, and if in real estate to permit the son of the testatrix to occupy it, and to pay taxes and repairs if the son fails to do so, and with the express direction that the income was "not to be in anywise liable for any debts owing by my said son, nor for any debts that may be hereafter contracted by him," is a valid spendthrift trust to be held by the trustee, although there was no devise over of the corpus of the estate after the son's death. **Minnich's Est.,** 405.

6. *Spendthrift trust—Charity — Intestacy — Execution — Attachment execution — Legacy — Decedent's estates — Acts of April* 13, 1843, *P. L.* 233, *and April* 10, 1849, *P. L.* 619. **Ellwanger v. Moore,** 234.

7. *Suit against trustee—Equity jurisdiction—Remedy at law—Corporations—Mortgage.* **Sprigg v. Com. Title Ins. & Tr. Co.,** 548.

TURNPIKES.

1. *Street railways—Eminent domain—Act of May* 14, 1889, *P. L.* 211. **Hinnershitz v. United Trac. Co.,** 91.

UNDUE INFLUENCE.

1. *Will—Probate—Issue d. v. n.* **Alexander's Est.,** 47.

2. *Will—Probate—Issue d. v. n.—Testamentary capacity.* **Kane's Est.,** 204; **Richmond's Est.,** 219.

UNINCORPORATED ASSOCIATIONS.

1. *Voluntary association—By-laws—Amendment of laws—Vested right—Pilot's association.* When the rights of a member of a beneficial association have become fixed they cannot be affected by a change of the by-laws without his consent.

A voluntary association of pilots adopted the following by-law: "A member losing his license for any other cause than intoxication shall receive half pay until reinstated." A member in active service and good standing became disabled by reason of impairment of his eyesight, and could no longer pursue his calling. His license was revoked and he was accorded half pay. Subsequently the by-law was amended so that it would read, "A member losing his license through accident to the vessel, or through any other cause, except intoxication, shall receive one half pay until reinstated. A member losing his license for not being capable of following his business shall receive fifty dollars per month." *Held*, that the disabled member was not bound by the amended by-law. **Marshall v. Pilot's Assn.,** 182.

VESTED AND CONTINGENT REMAINDERS.

1. *Wills—Construction.* **Raleigh's Est.,** 451.

VESTED RIGHTS.

1. *Voluntary association—By-laws—Amendment of by-laws—Pilot's association.* **Marshall v. Pilot's Assn.,** 182.

WAGES.

1. *Injuries—Street railways—Damages.* **Glenn v. Phila. & West Chester Trac. Co.,** 135.

2. *Master and servant — Payment — Presumption — Housekeeper.* **Schrader v. Beatty,** 184.

WAIVER.

1 *Municipalities — Subcontractors' bonds — Evidence.* **Phila. v. Neill,** 333.

WATER COMPANIES.

1. *Boroughs—Contracts.* Where a borough has in 1897 entered into a contract with a water company by which the latter was to supply the borough with water for fire purposes and the citizens of the borough with water for domestic purposes, the borough cannot thereafter violate its contract by the erection of a waterworks for supplying itself and its citizens with water. **Potter Co. Water Co. v. Austin Boro.,** 297.

WILLS.

1. *Conversion—Power to sell.* In order to work a conversion of a testator's land into money from the time of his death, there must be either, "1st. A positive direction to sell; or, 2nd. An absolute necessity to sell in order to execute the will; or, 3d. Such a blending of real and personal estate by the testator in his will, as to clearly show that he intended to create a fund out of both real and personal estate, and to bequeath the said fund as money."

Testator directed as follows: "I direct that my farm be leased if the same can be done to advantage, otherwise I direct that my executor shall sell the same at public or private sale, at such time as he shall deem it expedient so to do, and I hereby authorize and empower him to make good and sufficient deed for conveying the same to the purchaser." This clause was followed by gift to his wife of half of the income or proceeds of sale of the estate when sold, with the residue to certain persons named. *Held*, that there was no such positive direction or absolute necessity to sell as to work a conversion from the death of testator.

Where no conversion of land takes place under a will until by sale at the expiration of more than two years from date of testator's death the proceeds of the sale are discharged from all liability for the payment of decedent's debts. When the debts ceased to be a lien upon the land upon the expiration of the two years, they ceased also to be payable out of the proceeds of the sale of the land. **Cooper's Est.,** 628.

2. *Devise—Heirs—Widow of son.* A gift of real estate to the heirs of a son does not include the widow of the son. **Raleigh's Est.,** 451.

3. *Execution—Witnesses—Devise to religious and charitable uses—Act of April* 26, 1855, *P. L.* 328. A will containing a charitable or religious bequest to be valid must be executed precisely according to the statute.

The purpose of the Act of April 26, 1855, P. L. 328, was to establish a higher degree of proof as to the execution of a will containing a charitable or religious bequest than for other wills; and also to require such a will to be executed at a time when the testator might be in the full possession of his faculties, and not influenced by unscrupulous and designing persons when he was in the immediate presence of death. To attest or witness such a will, the witness must be present when the writing is signed and thereby becomes a will, or the testator may after he has affixed his signature acknowledge it to be his act in the presence of the witnesses.

Where one of the attesting witnesses to a will containing religious bequests signed it before the testator and out of her presence, and the other attesting witness signed it without seeing the signature of testator or knowing whether she had signed it or not, the will is not executed as provided by the Act of April 26, 1855, P. L. 328, and the religious bequests are void. **Irvine's Est.,** 1.

4. *Form of will—Testamentary paper—Probate.* No formal words are necessary in order to make a valid will; the form of the instrument is immaterial, if its substance is testamentary. A gift or bequest

WATER COMPANIES—*continued.*
after death is of the very essence of a will, and determines a writing, whatever its form, to be testamentary. Whether a writing is a will or not, does not depend upon the maker's declaring it to be a will at the time he executes it, but upon its contents.

A paper duly executed in conformity with the Wills' Act was offered for probate as follows: "To whom it may concern: This is to certify that in consideration of the fact that my step-daughter has shared her home with me and attended to my business, correspondence, &c., for me since the decease of my husband, and that she has made no charge for said courtesies during said period of time, Now, therefore, be it known that I desire and so affirm that my said step-daughter shall receive as compensation for said services out of my estate a sum of money or its equivalent that shall aggregate two thousand dollars—the aggregate amount of one hundred dollars per year for a period of twenty years to date. I also wish it to be understood that the above mentioned compensation shall not affect any right that she may have as devised to her in any will or testament of mine that may be in force at the time of my decease." It appeared that the amount mentioned in the paper was about half the estate which consisted of railroad and other stocks. The paper was delivered to the stepdaughter, and remained in her possession until the stepmother's death. *Held*, that the paper was testamentary in character, and should have been admitted to probate.

The delivery of a testamentary paper to the person beneficially interested, where no present interest passes, does not destroy the testator's power of revocation. It is still ambulatory; to take effect only after death in case it is not revoked. **Megary's Est.,** 260.

5. *Husband and wife—Antenuptial agreement.* **Bowman v. Knorr,** 270.

6. *Power of sale—Condition—Landlord and tenant.* A will after reciting that testatrix had rented certain real estate for three years, directed her executor "in case of my (her) death before the expiration of said lease," to collect the rents, etc., and then further directed him to give "the tenant three months' notice before the expiration of his present term, and at said time, and upon the vacation of said property by the said tenant, I authorize my said executor to sell the said property," etc. In the next clause she expressed the desire that her "estate may be settled and divided as soon as conveniently and legally may be after sale has been made of my said property." And in the last clause she appointed an executor, and provided "if I should live beyond the time that I have set for my executor to take charge of the above named property I authorize my executor with full power to carry out the above items and bequests at my decease." After the death of testatrix the executors sold the property to the tenant without having given three months' notice. After the sale the legatees elected to take the property as land. A sale was necessary for the payment of legacies. *Held*, (1) that the termination of the tenants' possession was not a condition precedent to the power of sale; (2) that the executor had a right to sell to the tenant without giving three months' notice; (3) that the election of

WATER COMPANIES—*continued.*

the legatees to take the property as land was too late, and also ineffectual by reason of the necessity of providing for the payment of legacies. **Hanbest v. Grayson,** 59.

7. *Power to sell—Conversion—Purpose.* Where a testator authorizes his executors to sell real estate for the payment of debts, any proceeds of such sales remaining after payment of debts is to be treated as real estate, and distributed as such. **Raleigh's Est.,** 451.

8. *Probate—Evidence—Identity of testatrix.* A paper signed with a mark and dated three years prior to the death of testatrix will not be admitted to probate where the evidence showed that the paper was prepared by a justice of the peace and executed before him by a woman whom he did not know; that one of the witnesses did not know the woman; that the other who apparently did know her was dead when the paper was offered for probate; that another woman present at the time of the execution, and to whom the paper was given, was also dead; that the paper was discovered in the effects of this woman three years afterwards; that the testatrix although attending the latter's funeral had never made any request or search for the paper; and that the paper offered made as the principal beneficiary of the estate, a person stranger in blood to testatrix, and with whom she had little to do. **McAndrews's Est.,** 366.

9. *Probate—Issue devisavit vel non—Testamentary capacity—Undue influence.* In an issue devisavit vel non where the testimony of the counsel who drew the will and the physician who attended the testator at the time, is positive as to testamentary capacity, there is a prima facie case which requires very strong evidence to offset.

In such cases the testator's actions and conduct of his business are of far more weight than the opinions of medical experts or the gossip of neighbors.

Evidence discussed and held insufficient to justify submission to jury. **Kane's Est.,** 204.

10. *Probate—Issue devisavit vel non—Testamentary capacity—Undue influence.* Where the physician who attended the testator and the attorney who drew his will, both of whom had known the testator well, testify to his entire testamentary capacity, and it appears that he continued in the transaction of his regular business until two days before making the will, a case is established which can only be overcome by clear, definite, circumstantial and weighty evidence of facts not reconcilable with the possession of testamentary capacity.

The opinion of an expert with no personal knowledge of the testator, and which is given on a hypothetical case based on disputed facts, is of no weight on an issue devisavit vel non. **Richmond's Est.,** 219.

11. *Probate—Issue devisavit vel non—Undue influence.* In a will contest where the only question was undue influence, it appeared that the testator, who was ninety years old, but whose faculties were unimpaired, divided his estate equally between three sons and a daughter, charging against two of the sons who were the contestants, an indebtedness alleged by the contestants to be in great part due from one of them only. The third son who was a half-brother to the other

children was in the habit of attending, under the testator's direction, many of the testator's business affairs and had the custody of his books and papers other than the will. This son aided his father in stating an account against the contestants, and in the books the greater part of the debt was charged against one of the contestants only. A letter of the testator with which the third son had nothing to do, indicated that testator entertained the idea that there were circumstances which made it proper to charge the debt against both of the contestants, and letters from the contestant not charged in the books, showed a recognition of the fact not only that the testator had entertained the idea of charging him in the will, but also that this idea was not irrational nor without some substantial basis. Testator's will was drawn by the testator's regular attorney, was executed before impartial witnesses in the absence of the third son, and remained in the possession of the attorney. *Held*, that the evidence was insufficient to justify the granting of an issue to determine whether undue influence had been exercised upon the testator.

Where it is sought to set aside a will on the ground of mistake of a material fact by the testator, the test is not whether the fact was or might be established to the satisfaction of another person, but whether it was a clear mistake on the part of the testator which misled him, or was a conclusion of his own judgment though different from that which a court or jury might reach on the same information. **Alexander's Est.,** 47.

12. *Probate—Register of wills—Revocation.* After the register of wills has admitted a will to probate, he has no power to entertain a petition for the revocation of the probate. **McAndrew's Est.,** 366.

13. *Sale of real estate—Intention of testator.* Where a testator directs that his real estate shall be sold when the youngest child of his son becomes of age, and further directs that in case a sale is made during the lifetime of his son, a sum shall be set aside for the support of his son, the sale will be made on the coming of age of the son's youngest child living at the death of the testator. **Gehr v. McDowell; Strite v. Norton,** 100.

14. *Vested and contingent estates—Construction.* Where persons who are to take under a will must be living at a certain time, the gift is contingent because until the time arrives the persons who will answer to the description cannot be ascertained.

Testator who was largely in debt directed by his will as follows: "I do hereby direct that after my business is closed up and all my debts paid, there shall be paid to my wife by my executors an annuity of $2,400, for and during all the term of her natural life; the balance of the income of my estate, from whatever source, to be equally divided between my six children, share and share alike, until the death of my wife. In case of the death of one or more of my children, without any lawful heirs, their portion shall be equally divided among the others. If any lawful heir or heirs, they to receive said amount annually, the same as their parents would have had if living . . . . It is my will and I do hereby direct that upon the death of my wife, my executors shall divide my entire estate into as many

WATER COMPANIES—*continued.*

equal portions as I shall have children living, or that should be represented by lawful heirs, and make a plain and clear statement of the division, describing the properties and numbering each lot or share, and have them of as near equal value as possible, then make the distribution as follows, viz.: Give the youngest child her choice of shares, and so on with those living according to age, and following with the lawful heirs of any deceased child or children, if any such there be, my executors to represent their interest and to choose for them." *Held*, that the children took contingent interests. **Raleigh's Est.,** 451.

WITNESSES.

1. *Attorney at law — Evidence — Confidential communication.* **Sargent v. Johns,** 386.
2. *Contradiction of — Evidence — Cross-examination.* **Blauvelt v. Del. Lack. & W. R. R. Co.,** 141.
3. *Evidence—Cross-examination.* **Glenn v. Phila. & West Chester Trac. Co.,** 135.
4. *Evidence—Party dead.* **Watkins v. Hughes,** 526.
5. *Opinion of—Negligence—Evidence—Grade crossing.* **Seifred v. Penna. R. R. Co.,** 399.
6. *Will—Execution—Devise to religious and charitable uses—Act of April* 26, 1855, *P. L.* 328. **Irvine's Est.,** 1.

WORDS AND PHRASES.

1. "*Course of business.*" **McCaul's Est.,** 506.
2. "*Damned bitch.*" **Stoner v. Erisman,** 600.
3. "*Heirs.*" **Raleigh's Est.,** 451.
4. "*Nearest friend.*" **Schoales v. Order of Sparta, 11**
5. "*Next friend.*" **Mitchell v. Spaulding,** 220.
6. "*Next of kin.*" **Mitchell v. Spaulding,** 220.
7. "*Railroads*"—"*Railways.*" **Phila. v. Phila. Trac. Co.,** 35.
8. "*Stop, look and listen.*" **Blauvelt v. Del. Lack. & W. R. R. Co.,** 141; **Kuntz v. N. Y. C. & St. L. R. R. Co.,** 162; **Bobb v. Union Trac. Co.,** 265; **Fleschhut v. Lehigh Val. R. R. Co.,** 348; **Seifred v. Penna. R. R. Co.,** 399.